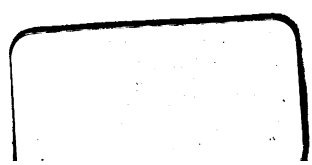

JMA
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EAST AFRICA PROTECTORATE.

Courts

LAW REPORTS

CONTAINING

CASES DETERMINED BY THE HIGH COURT OF MOMBASA,
AND BY
THE APPEAL COURT AT ZANZIBAR,
AND BY
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
ON APPEAL FROM THAT COURT.

1897—1905.

WITH APPENDICES

CONTAINING

NOTES ON NATIVE CUSTOMS, APPEAL COURT RULES
LEGAL PRACTITIONERS' RULES,
HIGH COURT RULES, CIRCULARS, &c.

COMPILED BY

R. W. HAMILTON,
Principal Judge, High Court.

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INTRODUCTION.

THE cases herein contained have been selected for report as illustrating the laws and customs existing in the Protectorate, and the practice and procedure of the Courts. Two appendices are added, Appendix I. containing notes on the customs of the more important tribes, and Appendix II. a reprint of:—

(1.) The Eastern African Protectorates (Court of Appeal) Order in Council 1902.

(2.) The Appeals Ordinance 28 of 1902.

(3.) The Rules of the Court of Appeal.

(4.) The Legal Practitioners' Rules (8 of 1901).

(5.) Rules for Legal Practitioners appearing in Native Courts, dated October 23rd, 1899.

(6.) Existing High Court Rules.

(7.) Circulars to Magistrates and Office Rules.

The laws administered in the Protectorate are varied, being as follows:—

(*a.*) Among Mahomedan natives in the dominions of the Sultan of Zanzibar, Mahomedan law, or the Sheriah as expounded by the Shafei school of commentators.

(*b.*) Among natives in the rest of the Protectorate, native law and custom, provided it is not repugnant to justice or morality; and among all natives such Acts and Ordinances as are specifically applied to them (*vide* Ordinance 2 of 1903).

(*c.*) Among non-natives, applied Indian Acts, local Ordinances and Regulations, and where these are inapplicable the Common and Statute law of England existing at the time of the passing of the Order-in-Council, 1897.

The growth of the powers and jurisdiction of the Courts on the mainland has been gradual. The I. B. E. A. Co. commenced to administer what is known as the "Coast strip" (*i.e.*, the dominions of the Sultan of Zanzibar leased from him) in 1899. Prior to that date a Consular Court had existed in Zanzibar only, but the following table shows the subsequent evolution of the Courts on the mainland:—

1890. A British Court was instituted by the I. B. E. A. Co. at Mombasa, presided over by an English barrister.

1896. The Government, having taken over the administration of the Country from the Company, a "Legal Vice-Consul" was appointed to preside over the Court.

1897. Under the Order-in-Council, 1907, the Protectorate Court was formed, presided over by a "Judicial Officer."

1899. By a further Order-in-Council the Judicial Officer received the title of "H.M. Judge."

1901. A second Judge was appointed as assistant to H.M. Judge.

1902. By the Order-in-Council, 1902, the "High Court for East Africa" was created and two Judges appointed by Royal Commission.*

For the greater part of the information contained in Appendix I., I am largely indebted to a number of memoranda and reports made between the years 1898–1901 by various district officers at the instance of Judge Cator. These have been compared and corrected with reference to each other, and to decided cases in which questions of custom have arisen. Other sources from which information has been drawn are the published works of persons conversant with native customs and enquiries which have come under the notice of the Courts. To all those who have contributed such information, and particularly to Mr. Hollis, I would express my thanks and the hope that with like aid it may be further corrected and enlarged in the future.

R. W. HAMILTON.

MOMBASA,

June, 1906.

* The appointment of a third Judge has been sanctioned in 1906.

EXPLANATION OF ABBREVIATIONS AND REFERENCES.

B.	Bankruptcy.
C. A.	Civil Appeal.
Cr. A.	Criminal Appeal.
Cr. C.	Criminal Confirmation.
Cr. R.	Criminal Revision.
O. C.	Original Civil Jurisdiction.
O.-in-C.	Order-in-Council.
P. C.	Privy Council.

One number placed above another, *e.g.*, $\frac{1}{1899}$ denotes the serial number of a case and its year.

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THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

ON APPEAL FROM THAT COURT.—(1897-1905).

APPELLATE CIVIL.

Before JUDGE HAMILTON and SHEIKH NASOR (Assessor).

SALIM B. ABDULLA *v.* FATUMA BINTI HAMIS. C.A. $\frac{4}{1898}$

Sheriah—Disputed ownership of slaves—Burden of proof—Limitation rule in Sultan's dominions, dated 23rd Shaaban, 1306.

Held.—A person laying claim to slaves in the possession of another must produce evidence in support of claim, though the Defendant alleges purchase—Claim must be made within 12 years from date of adverse possession.

Parties in Person.

Practice in cases relating to slaves.

NOTE.—Domestic slavery is recognised in the coast strip, but since 1890 fresh slaves cannot be acquired, and all persons are born free (decree, Seyid Ali). Although actions may be brought with regard to the ownership of slaves in the Sultan's dominions, the Courts will not order the transfer of slaves from one party to another, but where compensation is payable equitably will make a decree for the payment of money to the injured party. In a case of disputed ownership where the Plaintiff is entitled to succeed, the most approved form of decree is that by which the Plaintiff on receiving compensation grants the slave's freedom.

SALIM B. ABDULLA *v.* FATUMA BINTI HAMIS. C.A. 4/1898.

JUDGE HAMILTON.—This is a second appeal from a judgment given in the Provincial Court of the Seyidie Province, the original case having been heard before the Kathi of Malindi.

The Appellant claims to have bought some slaves from a woman Fatuma some 18 years ago, and the woman now claims the slaves to be hers, denying the sale.

The Kathi at Malindi called on the Appellant (the original Defendant) to produce witnesses in support of a document of sale which he had put before him, and gave him a certain period in which to do this. It then appears that the Appellant came to Mombasa and did not produce the evidence required within the time, and on his failing to do this the Kathi held that the slaves would become the property of the woman. On appeal to the Provincial Court the case was decided on the same grounds against the Appellant. The Kathi, however, Sheikh Nasor, and I myself are of opinion that the original Plaintiff should have been called on to prove her claim and produce her witnesses, which was not done, and the Appellant having been in possession of the slaves for so long the Claimant should have been called on to prove a better right to them than that of the Appellant.

The Appellant has also raised another point, and that is that the woman should, according to custom, have brought her claim within the usual 12 years, which was not done, and that this action was thereby barred. On both these grounds we are of opinion that the Appellant must succeed, and the judgment of the Lower Courts be reversed. And the Respondent pay the costs in this Court and the Courts below.

(*Appeal allowed.*)

ORIGINAL CIVIL.

Before JUDGE CATOR.

SUDI BIN MUSLIM *v.* M. R. DE SOUZA. O.C. 285/1898

Land in Mombasa—Local custom regarding land below the eaves of a thatched house.

Held.—Land under eaves of a thatched house is presumed to be part of the land on which the house stands.

Parties in Person.

In this case the Defendant, a Goanese, having purchased a thatched house, with the ground on which it stood, from a Swahili, commenced to erect a stone building on the site, placing the foundations on the line formerly covered by the extremity of the thatch eaves of the old house. The Plaintiff, his neighbour, contended that by so doing he was encroaching on his land. The matter was referred to the Acting Liwali and the Kathi of the town, and in accordance with their report judgment was given.

JUDGE CATOR.—Ali bin Salim and the Kathi both agree that in the absence of evidence to the contrary the ground under the eaves of Defendant's house must be taken to belong to him. The Plaintiff produces no evidence to the contrary, so I must dismiss the action.

(*Action dismissed.*)

NOTE—*Cf.* Adamji Alibhoy *v.* Adam Ali—O.C. $\frac{1053}{1898}$ p. 6. Sudi bin Mohamed *v.* Pires Pereira—O.C. $\frac{358}{1898}$ p. 3.

ORIGINAL CIVIL.

Before JUDGE HAMILTON.

SUDI BIN MOHAMED *v.* { PIRES PEREIRA. / Md. B. SALIM. } O.C. $\frac{358}{1898}$

Land in Mombasa—Local custom regarding land below eaves of a thatched house.—"kitoto."

Held.—In the absence of evidence to the contrary a width of three feet below the eaves of a thatched house is presumed to belong to the land on which the house stands.

Parties in Person.

In this case the Defendant sought to build an upper storey on to his house, and to add eaves in such a way that they would project over the eaves of the adjoining one-storied house belonging to the Plaintiff, alleging that he had a right to the strip of ground, or "kitoto," between the houses.

The Plaintiff on the other hand claimed the strip of land and the right to build against the Defendant's wall.

SUDI BIN MOHAMED *v.* PIRES PEREIRA, MD. B. SALIM. O.C. $\frac{358}{1898}$.

JUDGE HAMILTON.—This is a case in which the Plaintiff wishes to remove Defendant's roof over his ground, to restrain Defendant from allowing the water from his house to fall on his ground, and from opening windows or air-holes overlooking his property. It is admitted on both sides that the Defendant's house was standing long before the Plaintiff began to build, and at the time the Plaintiff bought his land, boundaries were extremely vaguely mentioned and there are no deeds giving measurements. What, however, I have to decide is to whom the disputed strip of land belongs, and I have come to the conclusion that by the custom of the country it must be taken as belonging to the Defendant. For three feet under the eaves is by custom the property of the houseowner.*

Now, the Plaintiff wishing to extend his building operations has claimed the right to build close up to Defendant's wall, but the evidence of his own witnesses is that the old house of Mohamed bin Salim (the Defendant) had a makuti roof, which would be sufficient evidence to show that he had the ground under the eaves, and that Plaintiff cannot claim to build against his wall.

(*Action dismissed.*)

NOTE—*Cf.* Sudi bin Muslim *v.* M. R. de Souza—O.C. $\frac{285}{1898}$ p. 2.

Adamji Alibhoy *v.* Adam Ali—O.C. $\frac{1053}{1898}$ p. 6.

ORIGINAL CIVIL.

Before JUDGE CATOR.

NOORBHOY ALIBHOY & CO. *v.* ISAJI ALIBHOY. O.C. $\frac{994}{1898}$

Reference to arbitration—Order in Council 1897, Article 37—Civil Procedure Code, Chapter XXXVII.—Award filed out of time.

Held.—Civil Procedure Code having been applied by the O.-in-C. 1897, subject to the provisions of that Order, references to arbitration are by Article 37 subject to the orders of the Court only and not governed by the Civil Procedure Code.

*NOTE.—The expression "houseowner" is somewhat misleading. The owner of a house being often not the owner of the land on which the house stands. According to Mahomedan law, a house is not regarded as by English law as "attached to the soil," but is removable. (Discussed in Charlesworth case p.c. 1900 p. 24.)

An award having been filed out of time, the Plaintiffs sued under Section 521 of the Civil Procedure Code to have it set aside.

MR. TONKS *for Plaintiffs.*
MR. MEAD *for Defendant.*

JUDGE CATOR.—A very curious point has been raised in this action. All matters in dispute were referred to arbitration by the parties after the action had been begun, and a time was fixed by the Court within which the award was to be given. The time was exceeded, and without applying for an extension the umpire gave his award. According to the Civil Procedure Code this undoubtedly made the award bad, and *primâ facie* it seems that the Civil Procedure Code should govern my decision, but Mr. Mead has argued very ingeniously, and to my mind successfully, that I am to be guided in this case by English and not Indian Law.

In so far as Indian Law is not specifically applied here English Law holds good. The Secretary of State can apply any Indian Act to this country with any modifications that he thinks proper, and the Order-in-Council of 1897 has itself applied the Civil Procedure Code amongst other Acts, but "subject to the other provisions" of the Order, and Mr. Mead points out that there are special provisions relating to arbitrations contained in Article 37 of the Order. I am not at liberty to assume that this article was inserted through inadvertence, and I must try and give effect to it, and the only way in which I can do so is by excluding the provisions of the Civil Procedure Code in relation to Agreements for reference to Arbitration and dealing with them under this Article. It is, however, to be noted that compulsory orders made in an action are untouched by the article, and must be dealt with under the provisions of the Code.

By this article the regulation of the proceedings are left absolutely in the hands of the Court.

From a perusal of the affidavits filed in the case, and from statements made to me by Counsel, I am satisfied that both parties acquiesced in the umpire proceeding to make his award after the prescribed time, and I shall not set it aside on that technical ground.

It appears to me that the applicant should have applied to the Court at a much earlier date, if, as he alleges, the umpire was not investigating the case in a proper manner, and I think he is only applying now because the award is not to his satisfaction.

I refuse to set the Award aside.

(*Action dismissed.*)

ORIGINAL CIVIL.

Before JUDGE CATOR.

ADAMJI ALIBHOY *v.* ADAM ALI. O.C. $\frac{1053}{1898}$

Rights of way in Mombasa Town—"Kitoto" or passage between two makuti-thatched houses—disputed ownership—claim to easement.

Held.—There is a presumption that the ownership of a "kitoto" is equally divided between the owners of the land on which the houses neighbouring the "kitoto" stand. Occasional user by members of the public will not be sufficient, without direct proof that the public had acquired a right of way.

Plaintiff and Defendant were owners of two adjoining plots of land with houses thereon, the two houses being separated by a narrow passage, or 'kitoto.' The Defendant laid the foundations of a new wall along this passage, but in that half of it nearer to his house. The Plaintiff thereupon brought this action to restrain him from trespassing.

The following issues were framed :—

(1.) Is the passage in question a public passage ?

(2.) If not, has the Plaintiff a right to its user as a way or passage ?

(3.) In the event of either of the first two issues being decided in the affirmative, has the Defendant encroached upon the passage, and if so to what extent ?

DR. NUNDY *for Plaintiff.*
C. M. DALAL *for Defendant.*

JUDGE CATOR.—This is an action which is being fought with the utmost strenuousness in respect of a narrow passage of the most trifling value. The Plaintiff and Defendant have respectively

purchased houses which are divided by a "kitoto," or narrow way, and the Plaintiff who, in a former action, failed to establish a claim to the ownership of the "kitoto" by virtue of a grant now seeks for a declaration that he is entitled to its use, either as a public right of way, or as a private way to another house of his near by.

I think that it has been pretty clearly established that originally this was an ordinary "kitoto" between two makuti houses, that is to say, that the makuti eaves of the adjoining houses met or nearly met in the centre of the passage which served to carry off the water from both houses, and I think that it has been established, if any evidence on the subject be necessary, that the owner of each house was the owner of one-half of the "kitoto," being so much as was beneath the eaves of his own house.

The question then arises whether the Plaintiff has acquired a private right of way to the entrance of another house which lies nearly opposite to one end of the passage. It seems quite clear that he can claim no right to its user as an easement, and after hearing all the evidence and inspecting the *locus in quo*, I have come to the further conclusion that the Plaintiff has failed to prove that this is a public road or path. It is true that people have from time to time passed down it, but the occasional use of a passage of this description does not to my mind show that the public generally has acquired a right to keep it open. No general rule can be laid down as to when a passage has been dedicated to or acquired by the public, but in view of the fact that a public way exists round the opposite sides of the Defendant's house which is more convenient for and is habitually used by the public, who will be deprived of no advantage by the closing of the passage, and that when the makuti roof existed on the Defendant's house it must have been difficult to get through the passage, I should require strong evidence that it had been habitually used by the public before declaring that it had become a public thoroughfare. To my mind the evidence on this point is very weak, and I must accordingly rule that the Plaintiff has failed to make out his case and dismiss the action with costs.

(*Action dismissed.*)

NOTE—*Cf.* Sudi bin Muslim *v.* M. R. de Souza—O.C. 285/1898 p. 2. Sudi bin Mohamed *v.* Pires Pereira—O.C. 358/1898 p. 3.

ORIGINAL CIVIL.

Before JUDGE CATOR.

DHUNJIBHOY POSTWALLA *v.* SECRETARY OF STATE. O.C.$\frac{1076}{1898}$

Dismissal of employé of Uganda Railway for misconduct—Chief Engineer, sole judge—Exercise of judicial functions.

Held.—Action taken solely in the report of a subordinate is not a judicial exercise of duties.

The Plaintiff was engaged in India to serve on the Uganda Railway for three years as crane driver.

His agreement contained the following clauses :—

"(6.) In case of gross insubordination or misconduct, of which "the Chief Engineer is sole judge, I shall be liable to instant dis- "missal, and forfeit all claims to a free return passage."

"(7.) This engagement is terminable by the Engineer-in-Chief "on three months' notice at any time."

Owing to his immediate superior being dissatisfied with Plaintiff's work, he recommended his dismissal, the Chief Engineer in consequence ordered him to be dismissed forthwith, without calling on him for an explanation.

Dr. NUNDY *for the Plaintiff.*

JUDGE CATOR.—The facts in this case are simple, but the point involved is of great importance to a certain class of servants on the Uganda Railway. The Plaintiff was engaged by the agent of the railway in India on the 26th May, 1898, as a crane driver for the Locomotive Department, but has been actually employed as an engineer in the flour mill. It appears that he did not do his work to the satisfaction of Mr. Davie his immediate superior, and that he was fined in August a sum of Rs. 10 for negligently burning some firebars.

Subsequently Mr. Davie, it is alleged, found that a part of the engine had become heated, and Mr. Vernet, the Locomotive Superintendent, has proved that serious damage was done by the heating of what is called a "bigend," and that it occurred while the Plaintiff was on duty and presumably from his negligence, although this is denied by the Plaintiff. Mr. Vernet reported the case to the Chief

Engineer and recommended that the Plaintiff should be dismissed for incompetency. A reply, written on behalf of the Chief Engineer was received to this report which runs as follows: "I have the honour to sanction the dismissal of crane driver D. T. Postwalla for gross neglect of duty with effect from date," *i.e.*, 28th September.

Mr. Vernet appears to have told Mr. Davie that the Plaintiff was to be dismissed, and on the 6th October, 1898, Davie wrote to the Plaintiff in these terms "I have the honour to inform you that your services are dispensed with from this railway on and from the 28th September, 1898." A point to be noted is that when the heating of the "bigend" occurred Mr. Davie struck the Plaintiff. The Plaintiff took out a summons for an assault on the 16th September, and on the 29th September Mr. Davie was fined Rs.10 for using unnecessary violence in ejecting the Plaintiff from the engine house.

There are three clauses that regulate the termination of Plaintiff's agreement before the end of the three years for which it is made. One relates to a case of ill-health and is not material to this action. Clause 6 runs as follows :—

"That in case of gross insubordination or misconduct, of which "the Chief Engineer is sole Judge, I shall be liable to instant "dismissal, and forfeit all claims to a free return passage."

Clause 7 runs "That this engagement is terminable by the "Engineer-in-Chief on three months' notice at any time."

The Plaintiff contends that the notice dispensing with his services is equivalent to a notice under Clause 7. The Defendants assert that the Plaintiff has been properly dismissed under Clause 6.

The powers contained in Clause 6 are very wide. The only judge is the Chief Engineer. He is in the position of an arbitrator, and the Court will not go behind his decision provided that he has held a proper enquiry as a judge, and the principal point before me is whether this proviso has been complied with.

Now, it is a fundamental rule in all judicial proceedings that an opportunity must be given to a party adversely affected to state his case to the Judge and to cross-examine any witnesses who give evidence against him, and it appears clear that no such opportunity was offered in this case. The Plaintiff swears to it, and Mr. Vernet frankly admits that no explanation was called for, on the ground that the matter was so clear as to make explanation useless. It seems that the Chief Engineer acted solely upon Mr. Vernet's report, and Mr. Vernet's written report merely recommends that the man may be dismissed for incompetency. How can it be held under these circumstances that the Chief Engineer has exercised his functions

DHUNJIBHOY POSTWALLA v. SEC. OF STATE. O.C. 1076/1898.

as a Judge? The severe power with which he is clothed is personal to himself and cannot be delegated to anyone else, and however clear the case may appear to be against a servant, still the servant is entitled to be heard in self-defence. And in this case there was special reason why care should be used, for the Plaintiff had brought an action for assault against his immediate superior, being the man who had reported him to Mr. Vernet.

There is another point in the Plaintiff's favour, and one upon which I think he could also make good his claim, for, although the Chief Engineer authorised Mr. Vernet to dismiss the Plaintiff for gross neglect of duty, this decision was never communicated to him, and all the notice that he received was the letter from Mr. Davie of the 6th October, 1898, which I have already read.

I accordingly come to the conclusion on the first issue that the Plaintiff has not been properly dismissed under Clause 6 of his agreement, and on the second issue I find that he is entitled to be paid as follows :—

1. His pay up to the 6th October, the date on which he received notice of dismissal, and I may say that I think he would be entitled to pay, even if properly dismissed under Clause 6, up to the date at which he is notified of his dismissal.

2. Three months' pay in lieu of notice.

3. The value of his return passage to India to be certified by the Registrar if the parties differ.

The sum claimed in lieu of free quarters I cannot allow. The Plaintiff did not ask for quarters, and if he preferred to make his own arrangements for lodging I cannot see that he has any claim against the Railway.

There only remains the question of the Rs.10 fine deducted from the Plaintiff's wages. I am inclined to think that the Railway is at liberty to impose reasonable fines for neglect of duty, but the matter has not been properly argued, and if the Plaintiff wishes to do so I will give him a further opportunity of being heard, otherwise the claim will be disallowed.

The Railway must pay the Plaintiff's costs.

(*Judgment for Plaintiff.*)

APPELLATE CIVIL.

Before JUDGE CATOR.

ABDULLA BIN ABDURREHMAN, (Appellant) C.A. $\frac{1}{1899}$

v.

ABDULLA BIN HAMED (Respondent).

Sheriah—Loan in kind, manner of repayment—Dollar currency mode of reckoning.

Held.—In a case of a loan of dollars in coin, repayment may be in dollars of a like amount in face value, though their real value has depreciated, or in Rupees reckoned according to the market value of the dollar.

The Plaintiff having lent $1,000 to the Defendant, refused to accept repayment in dollars when the loan became due, as the dollar had in the meantime become depreciated in value. He demanded payment in rupees at the rate Rs.2·2 a dollar, that being the conventional rate used by merchants locally for the purposes of their accounts.

The case was heard by the Sub-Commissioner at Lamu, who decided that the Defendant was entitled to repay the loan with a like number of dollars as the loan was in dollar currency, and the agreement to repay it was in the same currency.

Against this judgment the Plaintiff appealed to the Protectorate Court.

Parties in Person.

JUDGE CATOR.—This is a case of considerable importance not only to the parties but to the public generally. Some years ago the Respondent borrowed a sum of $1,000 from the Appellant. The loan was expressed to be in dollars, and Maria Theresa dollars were actually handed over. In those days the value of the dollar was about rupees two and nine pice, but for a long time past the value of the dollar has shrunk until now it is not worth more than about Rs.1·2.

The Respondent recently paid back his debt in dollars, but the Appellant raised an objection to accepting the depreciated coin, and

ABDULLA B. ABDURREHMAN v. ABDULLA BIN HUMED. C.A. 1/1899.

the matter was brought before the Provincial Court in Lamu to determine the dispute. Mr. Rogers, after taking the opinion of a number of persons familiar with the Sheriah, decided that payment in dollars was a sufficient discharge of the debt; and the creditor has appealed.

I think that the appeal must be dismissed. I have consulted with the Sheik ul Islam, and he confirms the opinion of the Provincial Court. In the first place this is a case between two native Mahomedans and is consequently governed by the Sheriah, so that even if I did not agree with the opinion of the Mahomedan Judges, I should be bound by it, unless I thought it to be contrary to natural justice, which I do not.

It is true that it is the custom of merchants along the coast to do a considerable amount of business in nominal dollars, that is to say, to use the word dollars for book purposes, meaning thereby a fictitious dollar of the value of rupees two and nine pice, but the case before me does not fall within this class of transactions, and I am of opinion that the debtor is entitled to pay off his debt in actual dollars, or in rupees at the market value of the dollar on the day of payment.

(*Appeal dismissed.*)

APPELLATE CRIMINAL.

Before JUDGE CATOR.

KISHAN CHAND (Appellant) *v.* REGINA (Respondent). CR.A. 2/1899

Porters' Regulations of May, 1896, Sections 11, 23—Failure to pay porters—Criminal liability of partners.

Held.— A person who has made himself liable for a caravan cannot divest himself of his personal responsibility for payment, and consequent criminal liability in the event of non-payment of the porters.

Mahomed Bakr gave Kishan Chand a contract for carrying goods up country. Kishan Chand entered into partnership with

Ganga Ram who had obtained and registered the porters. Kishan Chand being unable to carry out the contract. Mahomed Bakr took over the caravan. At the end of the journey the porters remained unpaid. Kishan Chand and Ganga Ram were convicted by the Provincial Magistrate, Mombasa, under Section 11 of the Porters' Regulations, 1896.

From this conviction Kishan Chand appealed.

C. M. DALAL *for Appellant.*

Section 11 of the Porters' Regulations only imposes a civil liability. The general principle contained in Section 73 of the Indian Contract Act is that the person who suffers by the breach can obtain damages from the person who caused it. No criminal liability attaches in such a case unless so expressed.

Mr. G. H. MEAD *for Respondent.*

The Appellant cannot divest himself of responsibility. Supposing the men had been registered first, and he thereafter entered into partnership with the person registering the caravan, he becomes liable under the regulations if the porters are not paid.

JUDGE CATOR.—I think that every partner in a firm that sends porters up country is equally liable to see that the regulations are complied with, and he is punishable in the case of a breach of this nature. I will do nothing to assist a man to evade the responsibility that is cast upon him, at the same time there is no doubt that a great distinction should be drawn between those men who are actively interested in a caravan or who transfer their interest for the purpose of trying to free themselves from their obligations and such as may have transferred their interests *bonâ fide* and may be only technically responsible. As I am satisfied there was no element of fraud in the transfer, in this case I reduce the sentence of imprisonment to the nominal fine of Rs.10.

(*Conviction upheld, fine reduced.*)

APPELLATE CRIMINAL.

Before JUDGE CATOR.

FAKIR CHAND (Appellant) *v.* REGINA (Respondent). CR.A. $\frac{5}{1899}$

Indian Penal Code (Act xlv. of 1860) section 492—Assistant Station-master, Uganda Railway—Application of section.

Held.—A station-master though bound by agreement to perform any reasonable duty is not an artificer, workman, or labourer, within the meaning of this section.

Fakir Chand entered into an agreement at Karachi in June, 1898, to proceed to Mombasa, and serve on the Mombasa-Uganda Railway, as assistant station-master at a salary of Rs.60 a month.

Clause 9 of his agreement read as follows :—

" Under this agreement I thoroughly understand that my " services are not limited to the work specified above, but I am liable " to be called upon to perform any reasonable duty in connection with " the railway for which I may be fitted."

On August 6th he was told to work as a signaller by the assistant traffic manager, who considered he was incompetent to act as a station-master. He refused to work as a signaller, and was convicted by Mr. Ryall, Railway Magistrate, under Section 492, and sentenced to one month's rigorous imprisonment and a fine of Rs.90, and a further month's imprisonment in default of payment.

Against this conviction and sentence he appealed.

C. M. DALAL *for Appellant.*

The man is not a workman, artificer, or labourer, who would be covered by Section 492. He had reasonable cause to refuse to act as signaller as he had forgotten how to perform telegraphic work.

Mr. G. H. MEAD *for Crown.*

Any person who gives personal service is a workman.

JUDGE CATOR.—I think there can be no doubt whatever that Appellant is neither an artificer, workman or labourer within the meaning of Section 492 of the Indian Penal Code under which he has been convicted. He was engaged as an assistant station-master on the Uganda Railway, and although he has bound himself to work

generally in any other capacity for which he may be fitted, if so called upon, it is clear that the duties which are specially named in his agreement are those which must determine whether he is within the scope of Section 492 or not.

No doubt everyone is in a sense a "workman" who does any work. But the word has received a limited meaning in our language, and has been practically confined to such work as a man does with his hands, and sometimes its meaning is not extended beyond a class of semi-skilled persons, but, however that may be, I consider that the Appellant is neither an artificer, workman or labourer. I have no doubt that the work of an assistant station-master is rather that of a clerk or supervisor than of a manual labourer, and his wages of Rs.60 a month would support this contention. I allow the appeal.

(*Appeal allowed.*)

NOTE.—*Cf.* Duni Chand *v.* Regina $\frac{6}{1899}$ p. 15.

APPELLATE CRIMINAL.

Before JUDGE CATOR.

DUNI CHAND (Appellant) *v.* REGINA (Respondent). C.A. $\frac{6}{1899}$

Indian Penal Code (Act xlv. of 1860), Section 492—Compounder in Medical Department—Application of section.

Held.—A compounder is not an artificer, workman, or labourer within the meaning of the section.

Duni Chand was engaged in India to proceed to Mombasa and serve as compounder in the Medical Department of the Mombasa-Uganda Railway, at a wage of Rs.30 per mensem. He had a quarrel with a hospital assistant and refused to work. In consequence of which he was convicted by the Railway Magistrate under Section 492 of the Indian Penal Code and sentenced to one month's rigorous imprisonment. At the foot of the Magistrate's judgment there appears the following note:—"On reconsideration that the prisoner "is not accustomed to hard work, I alter the sentence to one of "simple imprisonment only."

Against this conviction and sentence he appealed.

DUNI CHAND v. REGINA. C.A. $\frac{6}{1899}$.

C. M. DALAL *for Appellant.*

A compounder is not merely a skilled workman, he has to pass an examination to show proficiency.

Mr. G. H. MEAD *for Crown.*

A compounder is only a skilled labourer, who works with his hands. The low rate of wages he receives points in the same direction.

JUDGE CATOR.—This is a case of considerable difficulty involving the construction of Section 492 of the Indian Penal Code. The accused man, Duni Chand, was engaged in India by the Uganda Railway to act as compounder in the Medical Department, at a wage of Rs.30 a month. His agreement was in writing, and he was brought here at his employer's expense, so that he is punishable under the above-mentioned section for refusal to work if he can be shown to be an "artificer, workman or labourer" within the meaning of that section. He is certainly not an artificer, nor do I think that he can be called a labourer in the usual and accepted signification that is attached to that word, and after considerable hesitation I have come to the conclusion that he is not such a "workman" as is contemplated by the section. No doubt he is in a sense a workman, but the nature of his work requires such skill and education as in my opinion to remove him from the class of persons to which this section is intended to apply. I am told that a compounder has to pass an examination of proficiency, and that it is a step towards becoming a hospital assistant. This has not been proved, but I have little doubt that it is correct.

There is very little authority to help me to a decision. In the first place it has been laid down that a workman or labourer must be one who gives his personal services in exchange for wages (Riley *v.* Ward, 2 Exch. 59), and no doubt the accused complies with that definition, but it has been held that under Act No. xiii. of 1859, which is *in pari materia* with this section, a domestic servant is not included in the class of artificer, workman and labourer (*In re* Domestic Servants 3 B.L.R.A. Cr. J. 32), *vide* notes in "Starling's Penal Code."

If a domestic servant is not an artificer, workman or labourer, I do not think that a medical compounder can be held to fall within that class, and as this is a penal section it must be construed strictly in favour of the subject.

I allow the Appeal and order the discharge of the accused.

(*Appeal allowed.*)

Note.—*Cf.* Fakir Chand *v.* Regina, $\frac{5}{1899}$ p. 14.

ORIGINAL CIVIL.

Before JUDGE CATOR.

WALKER *v.* A. M. JEWANJI & Co. O.C. $\frac{632}{1899}$

Lessee of tram line—Liability for injuries to passengers caused by negligence of his servants—Assessment of damages.

Held—Lessee is liable for injuries received by a passenger in an accident caused by the negligence of the trolly boys in charge of trolly plying for hire with a defective brake.

Plaintiff was riding on a hired trolly which ran away down the Fort Hill. A collision occurred, in which she received injuries. The Defendant Company urged that the trolly was in good order, that the Plaintiff was riding beyond the point at which it was customary for passengers to alight, and that the accident was caused by contributory negligence on her part.

Mr. G. H. MEAD *for the Plaintiff.*

C. M. DALAL *for Defendants.*

JUDGE CATOR.—In this case the Plaintiff, who is a married lady, claims Rs.10,000 damages as compensation for injuries received owing to the negligence of the Defendants' servants. We have on this island a tram or ghari line of which the main part connects the town of Mombasa with Kilindini. It is the property of the Government, but has been leased to a Contractor, and owing to a transfer of the lease there was originally some doubt as to the proper person to be sued, but that difficulty has been arranged by the original lessee undertaking to be responsible for the payment of any damages to which I may consider the Plaintiff to be legally entitled.

The only vehicles in use on this tram line are trollies pushed by hand, and besides a number of private trollies there are a certain number that are let out for hire by the Contractor.

The immediate approach to Mombasa town is down a hill, the first part of which is of considerable steepness, and nearly at the foot of the steepest part is the ticket office from which trollies leaving Mombasa start, and where, according to the evidence, it is usual for passengers from Kilindini to alight and give up their tickets. From this point the incline, although still in the same direction, gradually becomes less and less until it almost runs out on

to the flat, but trollies that have acquired momentum by coming unchecked from the top of the hill will, if left to themselves, run to the termination of the line at the Custom House.

The Plaintiff, with a friend and her friend's child, travelled upon one of these public trollies one day last March from Kilindini to Mombasa; the trolly ran violently down the Mombasa Hill and came into collision with a handcart or else a luggage trolly about forty yards below Messrs. Boustead's Stores, with the effect that the trolly was considerably damaged, the occupants were thrown out of their seats and the Plaintiff received a very severe bruise upon the forehead and slighter injuries to her arm and leg. She was assisted into a neighbouring shop and had her bruises attended to, and after resting there some twenty minutes or half an hour she was able to go home. She now alleges that she is suffering from concussion of the spine arising from the shock of the collision.

The first point that I am called upon to determine is whether there was any negligence on the part of the Defendants' servants, and I come to the conclusion without much difficulty that such negligence has been proved. I am afraid that it is a very favourite practice for the trolly boys to come full tilt down the hill, and I believe that they did so in this instance. The defence has taken great pains to prove that there was no defect in the brake, and that this trolly could have been easily pulled up within a short distance, yet at a point far beyond the steep part of the hill the trolly was still running with great violence. Ismailji Babuji, one of the witnesses called for the defence, who was close to the scene of the accident at the time that it occurred, says that the boys were trying to put on the brake a hundred feet away, but that they could not pull up the trolly owing to the great velocity at which they were travelling. Mr. Leaky, who was at Boustead's Stores when the trolly passed, says that he thinks the boys were making some endeavours to put the brake down but without any effect whatever. I am inclined to believe that the boys let this ghari, which is a heavy one, run down at full speed in the first instance without attempting to control it, and that they were never aware of there being any obstruction on the line until the collision actually took place, but merely shouted out to people in the road to get out of the way, though it is possible that they let it get completely out of control and then vainly attempted to stop it. For the reasons that I will subsequently explain I have come to the conclusion that the ghari started at the top of the hill and was not stopped until the collision took place. The Defendants tried hard to show that the accident would have never happened had it not been for negligence on the part of the men in charge of the ghari with which the

trolly collided. How far these men were guilty of negligence I am not prepared to say, but I think the primary cause of the accident was the negligence of the Defendants' servants, and it is a very well established principle of law that a man who is guilty of negligence cannot shift the responsibility for that negligence from his own shoulders by showing that if it had not been for neglect on the part of another person an accident would not have occurred. It was the duty of the boys to keep the trolly under proper control, and I think that they wilfully omitted to do so, and consequently the Defendants must pay the penalty for their neglect.

Having disposed of the question of negligence I must next deal with the second branch of the defence which is that the Defendants were under no obligations towards the Plaintiff for any damage that might occur to her when travelling beyond the ticket office at the Fort. Mr. Dalal has put in the Government lease and suggests that his clients' liabilities only extend from the Kilindini ticket office to that in Mombasa, but therein I cannot agree with him. The whole line is leased to his client without exception, and I think that he would be the first to object if the Government forbade him from bringing up his trucks from the Custom House on the ground that the section of the line below the Fort had not been included in his lease. But, although I think there is nothing in this contention, I see much more force in Mr. Dalal's next argument, that as a matter of fact the Defendants only engaged to take the Plaintiff as far as the ticket office at Mombasa, and that beyond that point she was no better than a trespasser on the trolly.

I regret to say that this involves a question as to the credibility of the witnesses. The Plaintiff has sworn that the ghari started at the top of the hill and never stopped until it was arrested by the collision. Kadabhai Gallabhai, on the other hand, who was the Defendants' ticket collector at the Fort, declares that he stopped the trolly at the station and asked for her ticket, but that she refused to give it up and said she was going to a new shop; that she refused to get down when called upon to do so, and struck at the boys with her umbrella; that the pushers jumped aside to get out of the way of the umbrella, and that the trolly then started off itself, and that the boys seeing that it was going jumped on again. He says that the trolly stopped at the office for about five minutes.

It appears from the evidence that it is usual for people to get down near the office at the Ndia Kuu, but that by special arrangement passengers can be taken on as far as the Custom House. It is not alleged that any such arrangement was made in this case, but the Plaintiff's contention is that the ghari was never stopped at all

at the Ndia Kuu, so that no such question as to her right to travel below the Fort ever arose.

Both of the witnesses are interested parties: the Plaintiff in that her case largely rests upon this allegation, and Kadabhai because it appears to have been his duty to stop gharis and take tickets at the office, and, consequently, he is naturally unwilling to admit that he did not carry out his instructions, added to which his sympathy may be expected to be with the Defendant Jewanji, who is his master and caste brother.

Under these circumstances I proceeded to make the following experiment:—I took the actual ghari on which the Plaintiff travelled, which is known as the Juba, and loaded it up with a somewhat greater weight than that which Kadarbhai says was on it, and I started off the ghari so loaded just above the Ndia Kuu. Starting from this point so loaded the ghari proceeded to the scene of the accident in a leisurely manner, and it could easily have been pulled up at any point with a proper brake, or the boys could have jumped off and held it; and at the point where the accident occurred I think its pace was so slight that the occupants would have had but a trifling shock on coming into collision. After this experiment I feel perfectly satisfied that the Plaintiff's story is true, and that the ghari started at the top of the hill and was not pulled up until the accident happened. Kadabhai must either be mistaken or is not speaking the truth. I have no doubt upon the point.

The conclusion that I come to is that the Plaintiff was being carried on the Defendants' trolly, and had no opportunity of descending at the Ndia Kuu. Further, I think that there was such negligence on the part of the Defendants' servants, as to render the Defendants liable in damages for any injury that was occasioned to the Plaintiff by this accident.

The Plaintiff is accordingly entitled to some damages, for there is no doubt she was severely shaken and that her forehead was badly bruised, but she has put in a claim for very substantial compensation on the allegation that she is suffering from chronic spinal concussion the result of the accident. As to the severity of the concussion, as to its connection with the accident, and as to the extent of suffering or incapacity that it might entail I have nothing but the evidence of Dr. Macdonald to guide me, and unfortunately his opinion has been given with so much caution and want of decision, that I find it very hard indeed to come to any satisfactory conclusion as to the severity of the Plaintiff's injuries. She was attended for the bruise on her forehead at once, and although she seems to have had a narrow escape from a dangerous and possibly fatal wound, she did as a matter of fact

escape with no more than a severe bruise, which healed in a week or ten days, and she had in addition some trifling bruises on her arms and legs.

Immediately after the accident she was attended for these injuries. She saw the hospital assistant at Kilindini and the senior Medical Officer of the railway within a short time after the accident, but she made no complaint to them of any spinal affection, though according to Dr. Sieveking such a complaint if caused by the accident should have made its appearance within a few days. Both prior and subsequently to the accident she has been under medical treatment for one of the troubles which she attributed to the accident when being examined by Dr. Macdonald, and she seems to have concealed from him that she had been under treatment for the same trouble before. In view of these facts, and the very undecided opinion of Dr. Macdonald, I feel that I should do wrong to the Defendants in awarding damages upon such a scale as the Plaintiff would be entitled to for a very serious injury.

She received a bad bruise on the forehead and a very severe shaking, and I think that a reasonable sum to allow her as compention will be One thousand Rupees (Rs. 1,000) with the costs of the action.

(*Judgment for Plaintiff.*)

An appeal against this judgment was entered and tried by H.B.M. Court at Zanzibar (then sitting as Court of Appeal for East Africa).

The Appeal was heard before Judges Piggott and Ennis, who upheld the judgment on all points, save that of the amount of damages on which they expressed the following opinion :—

" We cannot agree with the estimate of the damages, we think " they are excessive for the actual damage sustained from these " injuries, for the pain and suffering undergone and the extra " expense that the Plaintiff has been put to in consequence."

" While upholding the learned judge with regard to his find- " ing that the accident was caused by the negligence of the " Defendants' servants we order that the damages for the injuries " sustained be reduced to Rs. 500."

ORIGINAL CIVIL.

Before JUDGE CATOR with Assessors.

TULSIDASS JETHA & Co. O.C. 907-10/1899

v.

SALIM B. KHALFAN AND OTHERS.

Ivory trade—Local custom—Caravan financed from different sources—Previous creditors—Priorities of persons entitled to share in proceeds.

Held.—Ivory having been obtained by a caravan, the financer of the caravan has a prior claim thereto over other creditors of the caravan leader, though they may have financed previous caravans of his. Where more than one person has financed a caravan there is no priority between them unless and until the ivory should be lodged on the premises and under the control of one of them.

Certain ivory having been brought down to the coast by a caravan leader, various persons, including the Plaintiffs, laid claim to it as having financed the caravan or previous caravans of the same party. The ivory was attached by the Defendants, and the case was fought on an application by the Plaintiffs to release the attachment.

Mr. G. H. MEAD *for Defendants.*

Dr. NUNDY *for Plaintiffs.*

The following issues were framed :—

Issue (1).—Is it a custom in the ivory trade of Mombasa that advances made for fitting out a caravan to obtain ivory should be a first, or any, and if so what charge upon any ivory obtained by such caravan ?

Issue (2).—In the event of any such custom being proved, does such a charge, if unpaid on the return of the caravan, become a charge upon the ivory acquired upon a subsequent expedition to that in respect of which the advances were originally made, and if so to what extent ?

Issue (3).—In the event of any ivory being delivered to a person up country being ivory payable in respect of advances previously

made, is the recipient entitled to keep such ivory against other persons having charges on ivory to be acquired by the trader, and if so is it a material fact that such advances were made in respect of the expedition in which the ivory has been obtained?

JUDGE CATOR.—This is a case which is of considerable interest to the mercantile community of Mombasa in that it raises a question concerning the customs of the ivory trade. A man named Said bin Suliman is in the habit of making expeditions into the interior in search of ivory. For the purpose of fitting out his caravan he has resource to borrowed money. His creditors are in the habit of advancing goods and taking a document which amounts practically to a bill whereby the borrower admits his liability to pay a certain quantity of ivory.

Said bin Suliman has not been fortunate in his trading, and on the last occasion when he went up country some two years ago, there were sundry outstanding claims for ivory against him, which had been incurred in respect of the fitting out of former caravans.

On the last occasion he borrowed largely of Tulsidass & Co., the Plaintiffs in this action, and to a small extent from the Liwali Salim bin Khalfan. Said has now returned, and unfortunately his ivory is not only insufficient to cover all his obligations, but it is admitted will not even pay what is due to Tulsidass.

On returning from his expedition Said was met at Nairobi by Tulsidass' agent to whom he handed all the ivory that he had obtained in payment so far as it would go of his debt.

The result of this is that one creditor who financed the caravan has obtained all the ivory while the other has got nothing, and the question for my determination is whether this is in accordance with the custom of the ivory trade.

Mr. Mead alleged that in a case of this kind all the creditors who had financed the caravan were entitled to payment *pari passu* out of whatever ivory might be obtained, and that one creditor could not defeat another by getting the ivory from their common debtor.

I have called to my assistance as assessors in the action two prominent ivory merchants of the town and the Sheik ul Islam, and both Mr. Mead and Dr. Nundy have felt so much confidence in their knowledge of the custom of the trade as to dispense with expert evidence.

The assessors are unanimously of opinion that the Plaintiffs must succeed in this case. They say that if the owner of the ivory lodges it in the Custom House, then the ivory is so lodged for the benefit of all those creditors who helped to finance the Safari which has succeeded in bringing it in, but if once one of those creditors can,

TULSIDASS JETHA & Co. v. SALIM B. KHALFAN AND OTHERS. O.C. 907-10 1899.

without the exercise of force or fraud, persuade the debtor to hand the ivory over, and that creditor can get the ivory into his own house, he has perfected his title, and however hard it may appear to be on the other creditors, his title must be allowed to prevail in preference to theirs until his whole debt is paid.

(*Attachment released.*)

PRIVY COUNCIL.

Present—THE LORD CHANCELLOR, LORDS HOBHOUSE, MACNAGHTEN, SHAND, DAVEY, ROBERTSON AND LINDLEY.

SECRETARY OF STATE FOR FOREIGN AFFAIRS *v.* CHARLESWORTH PILLING & Co., AND T. D. CHARLESWORTH & Co. P.C. 1900

Law applying to land in Sultan's dominions—Exterritorial rights of British subjects—Zanzibar Order-in-Council, 1884—Treaty between Great Britain and the Sultan, 1886—Indian Land Acquisition Act (1 of 1894)—Valuation of land acquired for Railway.

Held.—The source of jurisdiction is the Treaty:—

(1.) English foreign jurisdiction Acts give the Crown authority to direct by Order-in-Council in what way that jurisdiction shall be exercised. The Order-in-Council directs that it shall be exercised partly in accordance with applied Indian Acts and partly with English law. English law applies the local law of Zanzibar for such purposes as this.

(2.) Article XVI. of the Treaty of 1886 conferred on British subjects the rights of exterritoriality in respect of their persons and property, but such rights do not affect the laws applying to land when purchased by a British subject. A transfer of land even between British subjects is governed by the "*lex loci rei sitæ*," in this case the local Mahomedan law.

NOTE.—On second appeal from H.B.M. Court for Zanzibar sitting as Court of Appeal for East Africa. Reported I.L.R. Bomb. 1902.

(3.) By the local Mahomedan law a building erected by a trespasser does not become attached to the land, and the owner of the land on which it has been built can only claim to have it removed and the land restored to its original condition.

(4.) In valuing for compensation land compulsorily acquired under the Indian Land Acquisition Act, the basis is the market value at the date of the declaration under Sections 23, 24, including any advance that had taken place up to that date. Potential values likely to accrue in the future should be excluded from the computation.

On 27th May, 1896, the Indian Land Acquisition Act was applied to the Sultan's dominions under the Zanzibar Order-in-Council, 1884.

Before that date possession had been taken of the land at Kilindini required for the Mombasa Uganda State Railway, by whom buildings for a station were erected. On the 2nd November, 1896, a declaration of requirement of the land was made. The owners of the land being unable to arrange terms with the Collector, they appealed to the Court of the legal Vice-Consul who made an award slightly in excess of the terms offered by the Collector. From this award the owners appealed to H.B.M. Court at Zanzibar (which then sat as Court of Appeal for East Africa). The Appeal Court largely increased the award of the Court below and awarded damages for the trespass in a sum calculated on the value of the station buildings, &c., at Kilindini. From this judgment appeals and cross-appeals were lodged with the Privy Council.

Mr. HALDANE *for C. P. & Co.*

ATTORNEY GENERAL *for Secretary of State.*

The following judgment of the Privy Council was delivered by Lord Hobhouse.

These appeals relate to the amount of compensation to be paid for land in the Island of Mombasa, taken by the Government under statutory powers. The suits were commenced by two claims lodged with the Collector by the firms of Charlesworth, Pilling & Co., and T. D. Charlesworth & Co., who were respectively owners of different plots of the land so taken. The Collector, Mr. Craufurd, who was also acting on behalf of the Government, made awards which the Plaintiffs did not accept, and which therefore were referred to the Consular Court of Mombasa. The Vice-Consul, Mr. Cator, awarded larger sums which the Defendant has not disputed. But the Plaintiffs were still dissatisfied, and they appealed to the Court for

Zanzibar. The Court again enhanced the amount of compensation with the effect that both parties are dissatisfied and both appeal from the decrees. There are therefore four appeals, two original, and two cross appeals in the two suits. They have all been consolidated and have been argued as one case falling under the same considerations, with the exception that one important item of claim is peculiar to one plot belonging to Charlesworth, Pilling & Co.

Mombasa is a small island adjacent to the coast of continental Africa, and it forms part of the mainland dominions of the Sultan of Zanzibar. The authorities who have dealt with this case are established and regulated by Her Majesty's Order-in-Council passed in 1884 and founded on a previous treaty; and by a subsequent treaty with the Sultan of Zanzibar in the year 1886. There have been later transactions between the Sultan and an English Company and the Queen, which are referred to in the judgment of the Vice-Consul and in the case lodged by the Defendant the Secretary of State. They confer on the Queen's Government extensive powers of administration during the continuance of existing agreements. But they are expressed not to affect the Sultan's sovereignty, and for the purpose of deciding questions of an international character in these suits, they have not been discussed in the Courts below and need not now be discussed.

The Order-in-Council dated 17th of October, 1884, is founded on the usual form of recital that by treaty, grant, usage, sufferance, and other lawful means Her Majesty the Queen has power and jurisdiction in relation to Her Majesty's subjects and others within the dominions of His Highness the Sultan of Zanzibar. The passages material for the decision of the present questions will be found in Sections 6, 7, and 8. Section 6 shows that the Order applies to British subjects in Zanzibar, to British ships in Zanzibar waters, to Zanzibar subjects and foreigners in specified cases, and to British-protected persons in so far as by treaty or the other means mentioned Her Majesty has jurisdiction in Zanzibar in relation to them.

"Section 7.—All Her Majesty's jurisdiction exercisable in "Zanzibar under the Foreign Jurisdiction Acts for the hearing and "determination of criminal and civil matters . . . shall be "exercised under the provisions of this Order, so far as this Order "extends and applies.

"Section 8 (*a*) . . . Subject to the other provisions of this "Order, and to any treaties for the time being in force relating to "Zanzibar, Her Majesty's Criminal and Civil Jurisdiction in "Zanzibar shall, so far as circumstances admit, be exercised on the "principles of, and in conformity with, the enactments for the time "being applicable, as hereinafter mentioned, of the Governor-

" General of India in Council, and of the Governor of Bombay in " Council . . . and so far as such enactments . . . are " inapplicable shall, so far as circumstances admit, be exercised " under and in accordance with the common and statute law of " England in force at the commencement of this Order.

" (*b*) . . . declares certain Indian enactments not affecting " this question to be applicable to Zanzibar.

" (*c*) . . . Any other existing or future enactments of the " Governor-General of India in Council, or of the Governor of " Bombay in Council, shall also be applicable to Zanzibar, but shall " not come into operation until such time as may in the case " of any of such enactments respectively be fixed by the Secretary " of State.

The subsequent treaty concluded in 1886 has the following provisions :—

" Article V.—Subjects of Her Britannic Majesty shall be per- " mitted throughout the dominions of His Highness the Sultan to " acquire by gift purchase intestate succession or under will, or in " any other legal manner, land, houses, and property of every " description whether movable or immovable, to possess the same, " and freely dispose thereof by sale, barter, donation, will, or " otherwise."

" Article XVI.—Subjects of Her Britannic Majesty shall, as " regards their persons and property, enjoy within the dominions " of His Highness the Sultan of Zanzibar the rights of ex- " territoriality.

" The authorities of His Highness the Sultan have no right to " interfere in disputes between subjects of Her Britannic Majesty " amongst themselves, or between them and members of other " Christian nations. Such questions, whether of a civil or criminal " nature, shall be decided by the competent Consular Authorities. " The trial, and also the punishment of all offences and crimes of " which British subjects may be accused within the dominions of " His Highness the Sultan, also the hearing and settlement of " all civil questions, claims, or disputes in which they are the " Defendants, is expressly reserved to the British Consular Authori- " ties and Courts, and removed from the jurisdiction of His Highness " the Sultan.

" Should disputes arise between a subject of His Highness the " Sultan, or other non-Christian power not represented by Consuls " at Zanzibar, and a subject of Her Britannic Majesty in which the " British subject is the plaintiff or the complainant, the matter " shall be brought before and decided by the highest authority of " the Sultan, or some person specially delegated by him for this

" purpose. The proceedings and final decision in such a case shall " not, however, be considered legal unless notice has been given, and " an opportunity afforded for the British Consul or his substitute to " attend at the hearing and final decision."

" Article XX.—Should a British subject die within the " dominions of His Highness the Sultan of Zanzibar, or dying " elsewhere, leave property therein movable or immovable, the " British Consul shall be authorized to collect, realise, and take " possession of the estate of the deceased to be disposed of according " to law."

" Article XXI.—The houses, dwellings, warehouses, and other " premises of British subjects, or of persons actually in their regular " service shall not be entered or searched under any pretext by the " officials of His Highness without the consent of the occupier, " unless with the cognizance and assistance of the British Consul or " his substitute."

Article XXIII. provides for the free exercise of religious worship.

In the year 1895 the Government were planning railway communication from some point in Mombasa into the African mainland. In December, 1895, the Plaintiffs entered into agreements by which they acquired title to three of the plots of land in question. The fourth plot was purchased in April, 1896. At the close of the year 1895 the Engineers of the Government entered on the land and began to erect railway offices on one of the plots known in these proceedings as Said-bin-Rashid. This was done without any lawful authority; and it has given rise to questions of some subtlety on which the Consular Court and the Zanzibar Court have differed in opinion. Their Lordships will first address themselves to these questions.

It was not till 27th May, 1896, that the Indian Land Acquisition Act of 1894 was brought into force in Zanzibar, and not till 2nd November, 1896, that Mr. Craufurd, the Consul-General, issued a notice under Section 6 of that Act, declaring that the land would be required for the railway, and inviting claims for compensation. The day of that declaration is the day on which the property is to be valued for purposes of compensation.

The Plaintiffs contend that on that day the buildings erected by the Government were theirs, and they claimed before the Collector to be paid for them. They did not in the first instance claim any specific sum for the buildings apart from the land, but in the course of the hearing before the Vice-Consul they put the amount at Rs.1,68,000. They contend that the rights of the parties are

governed by English law, according to which the buildings would become attached to the land. The Defendant contends that the case is governed by Mahomedan law, and that the landowner is not entitled to the buildings. The Vice-Consul decided that Mahomedan law applied and compelled him to disallow the Plaintiffs' claim entirely. The Zanzibar Court decided that English law applied, and they awarded to the Plaintiffs Rs.60,140, which was the cost of the buildings to erect. The Plaintiffs insist on the larger sum claimed by them as being the actual value on 2nd November, 1896.

The first question is whether the dispute is to be governed by the English or the Mahomedan rules applicable to unauthorised buildings on land. The Indian enactments which the Order-in-Council makes applicable as far as circumstances admit, either directly or by order of the Secretary of State, do not fit this case; and therefore Her Majesty's jurisdiction is to be exercised under and in accordance with the law of England. But the law of England recognises the principle that the incidents of land are governed by the law of its site. Therefore by the terms of the Order, if we look no further, Her Majesty would exercise her Zanzibar jurisdiction on the principle that Zanzibar law, which is Mahomedan law, applies to this case. And so far there is no difference of opinion in the Courts below.

But then the Order is made subject to treaties for the time being in force, and Article XVI. of the Treaty of 1886 confers on British subjects the rights of ex-territoriality as regards their persons and their property. The whole controversy turns on the meaning of this one word "ex-territoriality." The learned Counsel who argued this case could not find any decision on the construction of the term in a treaty. Nor do the text-books tell us much more than that the word denotes a fiction by which the house and land occupied by a foreign sovereign or his ambassador was treated in law as a part of his dominions; and that it is a convenient word to denote any group of privileges belonging to that class. Their Lordships refer to *Hall* on *International Law*, page 163; *Westlake* on *Private International Law*, 3rd edition, p. 236. The same writers warn us that fictions and metaphors must not be pushed too far.

The Court for Zanzibar appears to have pushed the metaphor very far; holding that the term works a complete separation of the British subject, and his property from the country in which they are (Rec. p. 493). It seems to have adopted the principle contended for in the Consular Court, and negatived by the Vice-Consul, viz., that where there is a question relating to land between two British subjects, the land must be looked upon as actually a piece of British land for the purpose of applying the law (p. 407).

Looking at the latter part of Section XVI. and the succeeding sections of the treaty which have been quoted above, we find that it actually specifies all the usual benefits accorded by Mahomedan powers to a British subject. If he is accused of crime or is Defendant in a civil suit, his case is decided by his own nation's Consul. If he is complainant the Consul may intervene to protect his interests (Article XVI.). His servants receive similar protection (Article XVII.). In case of bankruptcy his property is dealt with according to British law (Article XVIII.). On his death his property is to devolve according to British law and to be administered by the Consul (Article XX.). His house is not to be entered by the Zanzibar authorities against his consent unless the Consul authorises it (Article XXI.). He is to enjoy the free and public exercise of his own form of religion (Article XXIII.). Their Lordships do not say that the list of specific instances, though very full, is exhaustive of the general term. Other cases of the same kind would doubtless be included if such there are. But it is reasonable to conclude that the things specified show the nature of the immunities desired by and accorded to the British subject—complete personal protection, assurance of satisfactory judicial tribunals, and such enjoyment of his property for himself and for those who claim under him as British law would afford him for British property. It is going a long way beyond that, and beyond the reason for these immunities, to say that the moment a plot of land is purchased by an Englishman it is stamped with the same character, and is attended by the same incidents that would belong to it if it were actually transferred to England and surrounded by other English land; and to say that his neighbours, who may or may not be British subjects, must have their rights and liabilities governed by its fictitious and not by its actual situation. Their Lordships hold that the grant of ex-territoriality does not involve any such conclusion, and that the Vice-Consul is right in holding that in this case the local law applies.

The next question is how the local law is to be ascertained. Is it matter of evidence, or should the Consular Court take judicial notice of it? The Vice-Consul held that he was an English Judge, that it was to him foreign law and must be proved by evidence; though he says it is an extreme instance of that principle, especially as he is also one of the Sultan's Judges administering Mahomedan law. That circumstance, however, should make no difference in the principle, though it enabled the Vice-Consul personally to appreciate the evidence which he took. The Zanzibar Court was not called upon to express any opinion on this point because it held that the English law applies.

The situation is one of some complexity. The root of the jurisdiction is the treaty grant or other matter by which the Queen has power and jurisdiction in Zanzibar. She thereby becomes an authority in the foreign territory of Zanzibar, though exercising her powers quite independently of the will of the Sultan. On that state of things the Foreign Jurisdiction Acts supervene for the purpose of binding all the subjects of the Queen; and they enable her to order in what way her authority in Zanzibar shall be exercised. She orders that it shall be exercised in accordance partly with certain Anglo-Indian laws and partly with English law. The English law again for certain purposes, of which the present purpose is one, incorporates the local law of Zanzibar. But throughout the matter, Zanzibar remains foreign territory, and the Queen and her officers are acting as Zanzibar authorities by virtue of the power which she has acquired, and which is within its limits a sovereign power. It results that a Judge acting within these limits is a Zanzibar Judge, and is bound to take judicial notice of the Zanzibar law, whatever it may be, applicable to the case before him.

The Vice-Consul acting on his view took evidence on the Mahomedan law, which he found to be in favour of the Defendant's contention. He also stated that such was his own opinion which his experience as a Mahomedan Judge qualified him to form. Their Lordships are now called upon to pronounce for themselves, and to apply the Mahomedan law which the Plaintiffs' Counsel have argued to be in their favour. On this point they do not feel any difficulty. They follow the law laid down in the Hedaya as translated by Hamilton, Book 37, p. 539. "If a person usurp land and plant "trees in it, or erect a building upon it, he must in that case be "directed to remove the trees, and clear the land, and to restore it "to the proprietor. If removal . . . . . be injurious to the "land the proprietor of the land has the option of paying to the "proprietor of the trees or the building a compensation equal to their "value, and thus possessing himself of them; because in this case "there is an advantage to both and the injury to both is obviated." The passage then goes on to show that the compensation is the value which the trees or houses bear upon the proprietor being directed to remove them, because their owner is not at liberty to have them on the ground. That is conclusive against the Plaintiffs' contention that the buildings had become their property on the 2nd November, 1896.

The Plaintiffs' Counsel then argued that at all events they had on that day a right to call on the Defendant to remove the buildings and that they were entitled to be paid for their land with all rights attaching to it. It is not easy to see what such a right would be worth to them; but it is sufficient to say that no such claim has been

made. Their Lordships must hold that the Vice-Consul was right in wholly disallowing the claim of the Plaintiffs in respect of buildings, and that the Defendant's Appeal on this point must prevail.

There has been great difficulty in ascertaining the value of the land taken. By the Land Acquisition Act the Court is directed to take into consideration the market value of the land at the date of the publication of the declaration (Section XXIII.), and by Section XXIV. it is forbidden to take into consideration "*Fifthly*, any "increase to the value of the land acquired likely to accrue from the "use to which it will be put when acquired. *Sixthly*, any increase to "the value of the other land of the person interested likely to accrue "from the use to which the land acquired will be put."

The Plaintiffs claimed to be paid for the whole area as for building ground at Rs.2 per square yard, Rs.11,132 per acre, yielding a total of (in round numbers) Rs.7,00,000. The Collector took the average of a number of purchases effected by private contract between himself and various owners. That amounted to Rs.431 per acre yielding a total of about Rs.32,000. The Vice-Consul rejected both these principles.

The claims of the Plaintiffs he treated as utterly extravagant. There is land available and in demand for building in and adjoining to the town of Mombasa, and again adjoining to the harbour of Kilindini; and sea frontage is valuable. The Plaintiffs' land is at considerable distances from both these places, and it has no sea-frontage. There is no reason to suppose that it has any present value for habitations. The most part of it is jungle, though here and there are some patches of cultivation. Both Courts are agreed that independently of the railway its value is very small. The rather crude principle adopted by the Collector has this effect, that it does not distinguish between the various plots of land sold to him, which varied largely in price from Rs.750 an acre and more, down to Rs.64. Moreover, several of the contracts were made with Arabs, and the Vice-Consul thinks them of little value as evidence of price, because he did not find that the Arabs had taken in the idea that the value of their land, which they could actually obtain by bargaining, had been enhanced by the railway scheme; so that the prices given to them would unduly lower the average. As for Indians, he thinks that they were fully alive to the advantage they had got and were quite capable of insisting upon it.

On this part of the case a most unfortunate element has been imported into the controversy. The Charlesworths have accused the Collector of using coercion and deceit to get contracts showing a low average price, and the Vice-Consul complains that, being called upon

to pronounce on the validity of the award and on the value of the lands, he has been put to try the motives and character of the highly placed official who valued them in the first instance. He considers that the Collector gave great provocation to the Charlesworths by his faults of temper and by his high-handed dealing with the land before he had acquired any rights over it, but he entirely acquits him of any dishonesty.

Their Lordships regret that the Court for Zanzibar should have thought it necessary to try this personal altercation all over again. In the outset of their judgment they say that there are two principal questions. First the conduct of Mr. Craufurd, and secondly the amount of compensation. Now it may be that Mr. Craufurd's conduct was directly relevant to the question whether or no his award was valid. Its only relevance to the question of compensation was this: that it might have been found that the average of prices on which he relied was brought about by his own use of improper means. But his award had been adjudged to be invalid. His principle of valuation had been rejected, and his purchases from Arabs, all the cheaper purchases, had been thrown out of consideration by the Vice-Consul. Those decisions were not disputed by the Defendant. How after that his conduct could have any material effect on the question of compensation it is difficult to understand. As, however, the judgment of the Zanzibar Court has been read and commented on here, though not by the Counsel for the Plaintiffs, their Lordships think it right to say that nothing has come under their notice which justifies the severity of the Zanzibar Court towards Mr. Craufurd, or which leads them to think that the Vice-Consul's opinion of him is too favourable.

In coming to this conclusion their Lordships have not omitted to consider the evidence relating to Mr. Craufurd's purchase from Dewji Jamal, and to the non-production of papers in the arbitration, on which the Zanzibar Court have laid so much stress. Mr. Craufurd's proceedings were highly unbusinesslike, and were even calculated to raise suspicion. But their Lordships cannot discover anything approaching to fraud in them, and it is clear that, as regards the Vice-Consul, he was well aware that Dewji received valuable consideration for his land over and above his purchase money. The amount of consideration was the only point on which this purchase had any reference to the Vice-Consul's valuation. Their Lordships cannot help thinking that the Zanzibar Court attached far too much importance to the personal recriminations between Mr. Craufurd and the Charlesworths, and that thereby they in great measure lost sight of the real question which they had to decide.

Having rejected the Collector's method the Vice-Consul had to consider how he should arrive at the value. He could not follow the prices obtained by previous sale of parts of the same estate, because there were none such during the critical period. He had only the prices given by the Plaintiffs themselves in December, 1895. He would not follow the course of capitalising rental because it was unjust to the Plaintiffs; rentals for such lands being little more than nominal. So he set himself to inquire at what prices neighbouring properties of similar character had changed hands since the promulgation of the railway scheme; paying careful attention to the nature of the properties sold. The Plaintiffs gave evidence of several sales of small building plots in or close to the town of Mombasa at Rs.1. 8a. or even as high as Rs.1. 15a. the square yard. But in that locality there was demand for such building plots, and therefore prices ruled high. In the case of one witness Adamji, whom the Vice-Consul describes as the principal witness for the Plaintiffs and commends as thoroughly trustworthy, the Vice-Consul has made some arithmetical mistake, the only one traceable to him. He says that Adamji's prices work out at less than half a rupee per square yard; whereas they do work out at more than Rs.1½. But it remains true that the small plots, thirteen or so in number, which Adamji mentions as having been sold by him within a short time of giving his evidence in May, 1897, every one is near to the town of Mombasa and has a frontage on the mainland caravan route to Makupa. The same witness says that there is no demand for the shambas (the plots) behind. Sales of this kind are clearly of little use for ascertaining the value of the Plaintiffs' land, the situation of which, as above described, resembles rather that of the shambas behind than the plots which Adamji sold.

The Vice-Consul paid close attention to sales of land resembling that of the Plaintiffs. One Indian vendor Peerbhoy took Rs.550 per acre for land adjoining one of the Plaintiffs' plots and of the same character. Another Indian Laka Kanji sold land with a valuable sea-frontage for Rs.750 per acre. He had bargained with the Plaintiffs to sell it to them at prices beginning at about ⅓ of a rupee per square yard and coming down to ⅛. The latter price would be about Rs.920 per acre. The Plaintiffs either would not or could not buy at that price. Laka Kanji deposed that he was prepared to take less; and he did take less, and expressed himself to be well satisfied with his bargain.

Then there are purchasers of four plots at Kilindini Harbour in more advantageous positions than that of the Plaintiffs' lands. Mr. Baughan, managing partner of Smith, McKenzie & Co., a commercial firm of high standing, purchased a small plot from the

Government for Rs.550 per acre. In this case there was no question of the additional statutory 15 per cent. which a seller to the Government might claim to have considered as an element of price in a sale made by private contract in order to avoid an arbitration. That would tend to raise the price above Rs.550. On the other hand the plot had a good sea-frontage, and was in the nature of accommodation land to Mr. Baughan. And he thinks that the price was excessive, and that no other land in Kilindini is worth so much unless attended by exceptional advantages. The same firm acting for Sir Tharia Topan's executors sold land to the Government at Rs.550. So did General Mathews, first Minister to the Sultan. So did De Silva, a Portuguese owner, in whose case Mr. Craufurd was charged by the Plaintiffs with coercion, and the Zanzibar Court say that every kind of pressure possible seems to have been brought upon him. But the Vice-Consul, before whom the witnesses were examined at great length, holds that whatever pressure there was, De Silva knew perfectly well what he was about. Several other cases were examined by the Vice-Consul, who gives his reasons for thinking the prices high or low, or about the average mark. The upshot of his investigation was that he awarded sums which, when the statutory 15 per cent. was added, amounted:—for the largest plot of the Plaintiffs, Charlesworth, Pilling & Co. to Rs.750 per acre; for their second plot Rs.550; for their third plot, Rs.300; for the plot of the Plaintiffs, T. D. Charlesworth & Co. Rs.550. The awards amount in the aggregate to Rs.43,627.

The Court for Zanzibar awarded sums which, again adding the statutory 15 per cent., amount to Rs.2,420 per acre throughout, and to an aggregate of Rs.1,76,997. This is in addition to the Rs.60,140 awarded for the buildings on the Said-bin-Rashin plot.

Their Lordships will not here express in detail the minor points on which the Zanzibar Court has differed from the Vice-Consul. It must be remembered that the Vice-Consul had, for such an enquiry as this, more than the usual advantages of a Court of First Instance; for besides examining the witnesses, he knew the locality, and visited the spots in dispute. Moreover, their Lordships find that the Vice-Consul explains much more fully than does the Zanzibar Court, the mode in which he deduces his values from the evidence; and the values he brings out are not at nearly so great a distance from those which he examines. It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Every-one who has gone through the process is aware of this lack of

demonstrative proof in his own mind, and knows that every expert witness, called before him has had his own set of conjectures, of more or less weight, according to his experience and personal sagacity. In such an enquiry as the present, relating to subjects abounding with uncertainties, and on which there is little experience, there is more than ordinary room for such guess-work; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at. Nevertheless between the bulk of the evidence referred to by the Zanzibar Court, and their valuation at Rs.2,420 per acre there is a very wide gap; and how is it to be bridged over? The judgment of the Court leaves the answer to that question very uncertain.

One class of evidence which might serve the purpose is that of sales of small building plots in or close to Mombasa. To this the Zanzibar Court appeared to attach some importance, but they mention it rather vaguely and do not show how they apply it. Their Lordships think that the Vice-Consul was quite right in rejecting the sales of town building plots as a guide to the value of land. on which, as he shows, there was on 2nd November, 1896, and indeed up to the time of his judgment in July, 1897, no plot adapted for the building of godowns or bungalows, nor the chance of any. It seems to their Lordships that so far as the Court have followed this sort of evidence, they have followed a misleading guide.

Another piece of evidence relates only to the plot of T. D. Charlesworth & Co. It was purchased by Charlesworth, Pilling & Co. in April, 1896 for Rs.1,300. In October, 1896, they transferred it to T. D. Charlesworth & Co. for Rs.1,20,450 (£7,000) paid for by credit notes of T. D. Charlesworth & Co., and as to £6,000 applied to the discharge of a debt due by the former firm to the latter. The Vice-Consul says this was a mere fanciful value invented by the Plaintiffs themselves; being either some family arrangement or effected for the purpose of creating a standard of value. He refused to look at it. The Zanzibar Court say that though the price appears excessive it is not to be entirely disregarded, and that it affords some help in the task of fixing the proper price. To what extent they have relied on it they do not say. Their Lordships agree with the Vice-Consul, and think that to the extent to which the Zanzibar Court have relied on this transaction there has been error in their process.

These are the only specific pieces of evidence which tend to bridge over the gap between the prices on which the Vice-Consul relied and the price of Rs.2,420 per acre. If that price is to be justified, it must be on some more general considerations. Their Lordships have already, out of justice to Mr. Craufurd, made some

remarks on the disproportionate amount of consideration which the Zanzibar Court bestowed on his conduct. It is difficult to discover that his conduct was relevant at all to the question of compensation as it stood upon appeal, except possibly with regard to the single sale to De Silva; whether it ought to have been taken with the many others with which the Vice-Consul classed it as a fair test of value. The bearing of that is remote, indirect, and on so very small a portion of the case that whichever way it was decided it could not much influence the result. Yet this inquiry into conduct was the subject of fresh evidence—oral and documentary—none of which related to De Silva, and of half the written judgment. It is difficult to suppose that the Court would have paid so much attention to this matter unless they considered that it must in some way affect their judgment on the question of value. And yet so far as it did affect their judgment it must have led to error.

There is another general consideration of great importance. The sections of the Land Acquisition Act have been stated which provide that land is to be taken at its market value on a given day, and that the Court is not on the one hand to give more because the object for which it is taken is likely to increase its value, nor on the other hand to give less because the same object is likely to increase the value of the owner's remaining land. That appears to their Lordships to exclude for both parties speculations on the effects which the railway may produce on prices except to the extent to which it is shown that such speculations had actually entered into the market price of this sort of land by November 2nd, 1896.

There are some expressions in the judgment of the Vice-Consul (Rec. p. 414) which at first sight look as if he had admitted speculation on the subjects which the Act forbids. Remarks in that sense were made upon them during the argument though the Defendant has accepted the findings of the Vice-Consul and has never sought to disturb them in any way. But on reading the whole judgment together the expressions admit of the construction that the learned Judge was doing no more than trying to ascertain how far such speculations had actually affected men's dealings in the market. So read, they are in accord with the whole tenor of his reasoning, which bases his valuation on inferences from ascertained transactions. He points out that a year earlier the value would have been much less, that the Government had been badly served, and there had been such delay in introducing the Land Acquisition Act and in making the declaration under it that before the 2nd November, 1896, the Government itself had created special values.

The Zanzibar Court treat the matter very differently. After disposing of Mr. Craufurd's purchases and expressing agreement with

the learned Judge below that if the Government had come promptly into the field they would have had to pay very little, they continue as follows :—

" The purchases made by Mr. Craufurd, which have been dealt " with already, not constituting in our opinion such sales as to give " us a fair and proper rate, we must rely on other facts and the " evidence produced at the trial in the Court below.

" When we consider the potential or prospective value of the " land taken, whether what was or is now mere agricultural land will " probably in a few years' time become valuable, we must bear in " mind the fact that all this land is in close proximity and contiguous " with the terminus of a railway running many hundreds of miles " into the heart of the African Continent, for the construction of " which £3,000,000 has been voted by the Imperial Government. " Although the Plaintiffs' view of value in the future may be " somewhat sanguine, yet we think the learned Judge was also " somewhat pessimistic; a railway must increase trade and traffic " and the value of building sites near its most important station, " which undoubtedly is Mombasa."

The only " other fact " mentioned besides the evidence of specific purchases on which the Vice-Consul proceeded, and on which their Lordships have already commented, is the sale by one of the Plaintiffs to the other at a fictitious price. For after mentioning this and referring to the opinions of two gentlemen who gave evidence, and of another gentleman who was not called, as to the prospects of the Protectorate, they inclined to the opinion that it is in a prosperous condition " and it is legitimate to infer that the railway has been a most important factor in effecting it." They then add " On therefore the potential values we feel bound to differ from the learned Judge, and for that reason to estimate more highly the properties the subject of this Appeal." (Rec. p. 492.)

Their Lordships cannot read this part of the judgment without seeing that the learned Judges have admitted into their minds those very considerations which the Act directs them to exclude, viz.: speculations on the value likely to be conferred on the land taken for the railway by the construction of the railway itself. To what extent their valuation has been affected thereby does not appear, but it may easily account, even if standing alone, for any amount of increase over a market price which has been inferred from an examination of actual transactions.

Their Lordships conclude that the valuation of the Vice-Consul is more consonant to the evidence and is based on sounder principles than that of the Zanzibar Court. The Plaintiffs have profited largely by advances in the prosperity of the Protectorate which have been

caused by the advent of the British Government and by the action it has taken. If the officials had acted promptly the Plaintiffs would have got little if anything more than their purchase money plus the statutory 15 per cent. As it is they have by the Vice-Consul's valuation got within twelve months; for one plot twice what they paid for it, for another half as much again, for a third fifteen times as much, and for the fourth six times as much. The very large increase on those prices which the Zanzibar Court has awarded is due either to attending to evidence not properly applicable to the case, or to general considerations which ought not to have been allowed to enter into the mind at all. As regards evidence they have given misleading importance to sales of small building plots within or close to Mombasa; and they have treated the transfer from one set of Plaintiffs to the other as if it had some relation to market value. As regards general considerations, possibly that of the behaviour of the Collector, and certainly the large importance attached to "potential values" have been sources of error.

The Zanzibar Court made one decree on both Appeals of the Plaintiffs. It should have dismissed both with costs. Their Lordships will humbly advise His Majesty the King to make an Order to that effect on the Defendants' Appeals, and to dismiss the Plaintiffs' Appeals. The Plaintiffs must pay to the Defendants the costs of the consolidated Appeals.

APPELLATE CIVIL.

Before Sir C. ELIOT, JUDGES, PIGGOTT and ENNIS (with assessors). Sitting at Zanzibar as High Court for Chief Native Court of the East Africa Protectorate.

AHMED BIN MAHOMED (Appellant) O.C. $\frac{742}{1899}$

v.

HOSEIN BIN HAMIS (Respondent).

Sheriah—Suit on Arabic warakas, acknowledgments of debt—Deed of gift, "nathiri"—post obits—evidence invalidated by inconsistency.

AHMED BIN MAHOMED
v.
HOSEIN BIN HAMIS.
O.C. 742/1899.

Held.—Where there are two deeds relating to the same transaction one of which purports to be an acknowledgment of a debt and the other to be a gift of the same sum by the debtor to the creditor, there is an inconsistency which invalidates a suit brought on the deeds alone. The creditor can, however, sue on other evidence of consideration.

The original action was tried before Judge Cator with assessors in the Chief Native Court, when Hosein bin Hamis sued Ahmed bin Mahomed for the recovery of $3,000 alleged to have been advanced him in the shape of various goods supplied, Ahmed being the expectant heir of a wealthy and aged father. The various transactions were recorded from time to time on "warakas" the last, which summed up the preceding ones, being in the shape of a "nathiri," or deed of gift of the whole sum due.

Mr. G. H. MEAD *for Plaintiff*,

R. BYRAMJI *for Defendant.*

The Court found the documents were valid and gave judgment for the Plaintiff for the full amount.

Against this judgment the Defendant appealed, mainly on the ground that the evidence showed that only a small portion of the debt really represented goods delivered, and that a post-obit bond was illegal according to Sheriah.

The Appeal Court delivered the following judgment.

This is an Appeal from the Chief Native Court of the East Africa Protectorate. The original action was brought to recover $3,000 on five Arab deeds, the first four of which are ordinary "warakas" or acknowledgments of the debts, while the fifth, executed 11 years after the first "waraka," is a "nathiri," or deed purporting to be a deed of gift. The whole question for the Court to decide on the issue raised in the Court below is the validity of these deeds respectively. On careful consideration, and on taking the opinion of Sheikh Hamed bin Ismit and Sheikh Nasur bin Salem, both Arab gentlemen learned in the Sheriah, we have come to the conclusion that the "nathiri" is bad, because, although purporting to be a deed of gift, it goes on to state that it is given in satisfaction of a debt already contracted, which, according to Moslem law, makes the deed bad on the face of it.

The fact of this deed being bad, yet still purporting to be a deed of gift, affects those "warakas" which were made previous to the date of the "nathiri," as there is an inconsistency in the story told in the "nathiri" of this transaction when compared with that told in the "warakas," which state that they were given for an indebtedness. This makes the facts stated in the "warakas" contra-

dictory, unreliable, and not acceptable as valid evidence in a Moslem Court of Law.

In the face of this opinion, and the fact that the learned Judge who tried the case in the Lower Court stated in his judgment that the original Plaintiff could not be believed on his oath and that his evidence throughout was a tissue of falsehoods, We order that the judgment of the Lower Court be reversed and judgment entered for the Appellant with costs.

This judgment will not bar the Respondent's right to recover what is reasonable under his original cause of action for goods sold and delivered.

(*Appeal allowed.*)

APPELLATE CIVIL.

Before JUDGE HAMILTON.

SECRETARY OF STATE (Appellant) C.A. 27/1901

v.

MAHOMED BIN ABDULLA (Respondent).

British master and Mahomedan servant—Conflict of law—Servant leaving his work without notice—Rights of master.

Held.—The intention of the parties showing that the servant understood he was bound by English custom, English law therefore prevails. If a servant leaves his work without notice the master has an action against him for damages.

The Plaintiff (Appellant) having failed in his action in the Lower Court, appealed against the judgment of the Magistrate.

The facts of the case are contained in the judgment of the Court of Appeal.

Mr. G. H. MEAD *for Appellant.*

Respondent in person.

JUDGE HAMILTON—This is an appeal from a judgment of the Town Magistrate, Mombasa, dismissing an action brought by the Secretary of State to recover a month's wages from a native

Mahomedan servant in the hospital who left his service without giving a month's notice.

The facts in this case are that the Respondent, after writing to the Principal Medical Officer a letter in which he gave a month's notice of the termination of his service, left at once without waiting further.

The Magistrate appears to have referred the question as to whether damages were recoverable in such case by Mahomedan law to two Sheikhs, and to have given judgment in accordance with their opinion. Unfortunately, however, there is little to guide the Court on this point, as there is no record either of the question referred or of the actual opinions of the Sheikhs.

*Seeing that the Mahomedan law clearly lays it down that "a "servant is always responsible for loss which arises from his action, "whether there was fault or negligence on his part or not," I think it is not impossible either that the Sheikhs have erred in their law or that they have not fully understood the question referred to them. And though the master might have to prove the actual amount of loss arising from his servant's breach of the contract, I think he would be entitled to recover damages to that extent.

In this case, however, the laws to which the two contracting parties are subject are different, and in the case of a conflict between them it is to be considered which law should prevail. It has been laid down by Lord Watson in Hamlyn *v.* Talisker Distillery† that "When two parties living under different systems of law enter "into a personal contract, which of these systems must be applied to "its construction depends upon their mutual intention, either as "expressed in their contract or as derivable by fair implication from "its terms." And further, "It is necessary and legitimate to take "into account the circumstances attendant upon the making of the "contract."

Looking at the circumstances of this case where the Respondent was engaged as a monthly servant at the English hospital by an English servant of the Government, and where he understood that it was incumbent on him to give a month's notice if he wished to terminate the contract, it appears that he clearly understood that he was becoming a servant of the hospital on the terms and conditions that would be binding on an English servant making a similar contract of service.

I hold, therefore, that the contract should be interpretated by English law and the Appellant is entitled to recover from the

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* Ott. Civil Law. Chap. Hirers and hired man.

† (1894) A.C. 202-212. Dicey Conflict of Laws, 1896, p. 572.

Respondent damages for his breach, the damages to be reckoned at the rate of one month's wages, viz., Rs. 25, the sum claimed.

For these reasons I reverse the finding of the lower Court and direct that judgment be entered for the Plaintiff for Rs. 25.

Appellant does not ask for costs.

(*Appeal allowed.*)

NOTE.—(1.) There is no decided case in which it is laid down that a master has the right if his servant leaves without notice to stop a month's wages out of money due to the servant. He has, however, an action for damages. Whether the damages will be substantial or nominal depends on the circumstances of the case. *cf.* Mayne on Damages, VIth Ed., p. 231, *et seq.* Bowes *v.* Press. 1894, 1 Q.B. 202.

(2.) A servant leaving his service without cause forfeits his right to wages for the time he may have served during the month in which he left. Ramji Mamar *v.* Little, 10 Bom. 57. Dhumee Behara *v.* Sevenoaks, XIII, Calc. 80.

(3.) Disputes between master and servant are now governed by the provisions of the Master and Servants Ordinance, 1906.

APPELLATE CRIMINAL.

Before JUDGE HAMILTON.

TULSIRAM, Appellant *v.* REX, Respondent. CR. A. 1/1902.

Indian Penal Code (Act XLV of 1860) Section 419—Using coolie's free pass on Uganda Railway—Cheating by personation, incomplete offence, attempt.

Held.—Attempt to travel on another person's free pass by a person not entitled to a free pass is an attempt to cheat by personation.

Tulsiram, a cooly at Nairobi, wishing to return to India, purchased from another cooly, time-expired, a pass to India entitling him to a free passage to Mombasa, and took his seat in the train intending to proceed. He was observed by a Police Inspector and made to leave the train before it started.

He was charged before the Railway Magistrate and convicted under Section 419 of the Code of cheating by personation.

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Against this conviction he appealed mainly on the ground that he acted in his own name and therefore could not be said to have personated anyone.

Appellant unrepresented.

Mr. G. H. MEAD *for the Crown.*

" Cheating by personation " is defined in Section 416 of the Code, and a man representing himself to be a person other than he really is falls within that definition.

In this case the accused represented himself to be what he in fact was not, *i.e.*, a time-expired cooly entitled to a pass.

JUDGE HAMILTON.—I am of opinion there is no doubt as to the facts on which Appellant was charged.

He, not being entitled as a railway cooly to a pass at a reduced rate back to India, purchased one cheaply from another cooly who was so entitled, and took a seat in the train at Nairobi, intending to commence his journey.

A police inspector, however, recognised him and prevented him leaving; he was brought before the Magistrate and charged and convicted of the offence of cheating by personation under Section 419 of the Code. As, however, it does not appear that his action, in fact, caused wrongful loss to any person or wrongful gain to himself, I do not think he should properly have been convicted of the completed offence, he should have been convicted of an attempt to cheat by personation.

I direct the conviction to be entered accordingly, and confirm the sentence.

(*Appeal dismissed.*)

APPELLATE CIVIL.

Before JUDGE HAMILTON.

AISHA BINTI VALI and NYANYA BINTI HAMIS *v.* FATUMA BINTI SHAABEK. C.A. 23/1902

Sheriah—Disputed paternity—Child born more than six but less than nine months after second marriage, the mother not having observed an " eddat."†

Held.—In the absence of satisfactory proof of paternity where a question of heirship to property is involved, the child must be considered to be an

† "eddat," *i.e.*, observation of three monthly courses subsequent to the termination of a cohabitation.

heir, and the property held in trust till the child comes of age, when he (or she) has the right to elect his (or her) paternity.

The original action was brought by Fatuma in the Court of the Town Magistrate, Mombasa, for a declaration that Nyanya, an infant, was not the lawful daughter of Hamis bin Vali, deceased, by his concubine Sadeh, and that Plaintiff was his lawful widow.

The facts are as follows: Hamis bin Vali had a concubine, Sadeh, with whom he cohabited. After a quarrel he gave her in marriage to one Mbaruk. Sadeh went straight from Hamis' to Mbaruk's house, and eight months subsequently the child, Nyanya, was born.

On Hamis' death, Fatuma, his widow, brought the action referred to to exclude Nyanya from sharing in Hamis' estate.

Sheikh Mahomed bin Kassim, Kathi, as assessor in the Lower Court, gave the following opinion :—

"If a child is born more than six months after the marriage of "its mother, whether the mother's master declare the child to be his "or deny it, it is considered to be the child of the husband and not "of the master."

In accordance with this opinion the Magistrate decided in favour of Fatuma.

An Appeal against this judgment was entered on behalf of Nyanya on the ground that Sadeh being actually pregnant by Hamis at the time of her marriage to Mbaruk the case was not covered by the law as quoted in the Court below.

Further evidence having been admitted on this point, and the assistance of the Sheikh ul Islam having been required as assessor, the following opinions were given by him on the law applicable to the case :—

(1.) If Sadeh was, in fact, pregnant at the time of the marriage, having observed no eddat, and Mbaruk was cognisant of the fact, the marriage would be void, and the child would be considered the child of Hamis.

(2.) If Sadeh was, in fact, pregnant at the time of the marriage, but her pregnancy was unknown, the marriage would be valid, but the paternity of the child would have to be decided by evidence as to likeness, or failing that, by election by the child on arriving at full age.

The following is the judgment :—

JUDGE HAMILTON.—The witnesses called by the Appellant have not proved that Mbaruk was cognisant of the pregnancy of Sadeh at the time of the marriage, though they show that Sadeh went

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straight from her master's house to her new husband without completing an eddat and that, in fact, she was probably pregnant by her master at the time of the second marriage.

These being the facts, the Sheikh states that the question of paternity must be settled by an examination of the child by persons experienced in discerning traces of blood relationship. Where there are not such persons procurable, as here, the child must be considered as heir where there is property in dispute, and the share she would be entitled to should be kept in Court till she comes of age when she has the right to elect her father.

I must consequently set aside the decision of the learned Town Magistrate as far as relates to Nyanya and make a provisional order that the share in the estate of Mwenye Hamis to which Nyanya would be entitled as his daughter be kept in Court until she come of age and make her election.

(*Appeal allowed.*)

APPELLATE CIVIL.

Before JUDGE CATOR.

ABDULLA BIN RITHIWAN — C.A. 25/1902
v.
MWANA IKI BINTI SALIM.

Sheriah—Limitation rule in Sultan's Dominions — Order of Sultan of 23rd Shaaban 1306—Declaration of Sir A. Hardinge, 1st September, 1898.

Held.—The rule of twelve years' limitation for claims applying to natives in the Sultan's mainland dominions, commences to run in the case of land from the date of possession and not from the date when Plaintiff first learnt of the possession, where fraud is not alleged.

NOTE.—The Indian Limitation Act applied by the Order-in-Council, 1897, does not apply to natives; Ordinance 2 of 1903, "Application of Indian Laws to Natives." Within the Sultan's dominions the twelve years' rule applies; (*semble*) without the dominions there is no law on the subject applying to natives beyond native custom. Though the practice is to discourage claims of ancient date and to follow generally the provisions of the Indian Limitation Act, Magistrates and Collectors should use their discretion in allowing some latitude in exceptional cases.

JUDGE CATOR.—This case involves rather a troublesome point of law, but on consideration I think that the Town Magistrate came to a correct decision.

The Respondent holds some land. By her own account her mother obtained it from a man named Ali bin Salim, and the Respondent admits that the heirs of Ali bin Salim did not share in this property.

She and her mother before her have openly held the property for about twenty years, and five years ago she successfully contested an adverse claim by a third party.

The Appellant says that it was only in consequence of what transpired in that case that he came to know that the property originally belonged to Ali bin Salim, and that the period of limitation can only begin to run against him from the time that he acquired this knowledge.

If there had been any sort of fraud in the matter I think the Appellant's contention would be good, but fraud is not alleged.

(*Appeal dismissed.*)

Note.—*Cf.* Salim bin Abdulla v. Fatuma binti Humis—C.A. $\frac{4}{1898}$ p 1.

APPELLATE CIVIL.

Before JUDGE CATOR.

GANESH LAL (Applicant) C.A. $\frac{28}{1902}$

v.

DEVI AND GANGA SINGH (original Defendants).

Mortgage of Crops—Registration—Priority—English Bills of Sale Act. Application under Section 622 of Civil Procedure Code.

Held.—Movables cannot be hypothecated except by Bill of Sale. English Bills of Sale Act applies. Registration does not give priority.*

Ganesh Lal sued the two Defendants for a sum of money in the Town Magistrate's Court, Nairobi, and got a judgment for Rs.175. He produced as evidence of his claim an unregistered mortgage on Defendants' first crop. Thereafter one Price produced a registered mortgage of all the crops signed by the first Defendant,

*—*Cf.* Provisions of Art. 11 O.-in-C. 1897.

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and obtained an order that it should be satisfied in priority to Plaintiff's mortgage and that 35 bags of potatoes already received by Plaintiff towards satisfaction of his decree should be given up to him.

Plaintiff applied for revision under Section 622 of the Code, the application being made subsequently to the passing of the Order-in-Council, 1902, but prior to the creation of a High Court thereunder in the Protectorate.

Price's name was added to the Record as Defendant, and at the hearing of the application there appeared

HAKIM *for the Applicant.*

Mr. O. TONKS *for Price.*

The original Defendants were not represented.

JUDGE CATOR.—This is a case which raises an important question of law. The Plaintiff, Ganesh Lal, sued the Defendants for a sum of money and obtained a judgment. At the hearing he produced a document which purported to mortgage a certain crop of potatoes but the suit was not that of a mortgagee, and the Court merely gave him an ordinary judgment for money.

It appears that 35 bags of patotoes were then delivered to the Plaintiff in or towards satisfaction of his decree.

About a fortnight later, Mr. Drumkey applied on behalf of a man named Price for a declaration that the potatoes belonged to him as the holder of a registered mortgage on the shamba and crops.

The Plaintiff's pleader objected to any order being made as Price was no party to the suit, but in spite of his protest the Judge ordered the potatoes to be handed over to Price.

Price's pleader seems to me to have acted in a very improper manner, and to have taken advantage of the Judge's unfamiliarity with the rules of procedure. No summons was issued, and I cannot find that the pleader even filed a Vakalatnamah.

But apart from this, I think the Judge came to a wrong conclusion. In the first place registration *per se* gives no priority in this country. In the second place there is no obligation upon a party to register any document which only relates to movables, and in the third place, I have come to the conclusion that movables cannot be hypothecated except by Bill of Sale.

The Indian Transfer of Property Act declares in terms that immovable property does not include growing crops, and although a mortgagee entering into possession of land under a mortgage will be entitled to the crops on the land at the time he takes possession, his mortgage will give him no rights over any crops raised or severed from the land.

In India it would seem that movables may be the subject of mortgage on the ground that the common law permits of their being mortgaged, and that no act analogous to the English Bills of Sale Act has ever been passed in India.

In this country, however, we are subject to English law, and I think the Bills of Sale Act applies, and that any mortgage of chattels must be made in conformity with that Act, the requirements whereof so far as I am aware can be complied with without difficulty.

On these various grounds I have no doubt that Price should return the potatoes, but my only doubt is how far I can make a valid order to that effect.

The application before me purports to be made under Section 622 of the Civil Procedure Code, but that Section only relates to applications made to a High Court, and although our last Order-in-Council declares that there shall be a High Court in the Protectorate, that declaration will not take effect until Judges of the High Court have been appointed, which has not yet been done. In the meantime the old procedure still maintains, and I think the application should have been made to the old High Court sitting in Zanzibar.

I hope, however, that this expression of my opinion may cause a friendly settlement of the case and that the matter may not have to proceed further.

(*Application dismissed.*)

CRIMINAL REVISION.

Before JUDGE CATOR.

SACHABHOY KALLIAN & Co. *v.* SECRETARY OF STATE. CR.R. 1/1903

Street Cleaning and Lighting Regulations, 31 of 1900—Obligation on occupier to clean and light—Alternative payment—Annual rent assessment—Notice—Remedy Civil action.

Held—Occupier is not punishable criminally for failure to pay rates, but for failure to discharge his obligations as to cleaning and lighting—Sub-Commissioner is bound by terms of public notice fixing assessment.

Criminal proceedings were taken against the occupiers of a house in Mombasa for failure to pay rates which had been increased without notice. The Town Magistrate issued a criminal summons and ordered the Defendants to pay the sum claimed for rates as increased.

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On this the Defendants applied for revision; the Court, after hearing arguments of

C. M. DALAL *for Applicants*,

Mr. G. H. MEAD *for Crown*,

gave the following judgment.

JUDGE CATOR.—This case raises a question under the Street Cleaning and Lighting Regulations of 1900.

The Applicants have been prosecuted for refusing to pay a certain sum as a rate for premises which they occupy in Mombasa.

The circumstances are rather peculiar, for the primary obligation on the occupier is to keep the neighbourhood of his premises cleaned and lighted. As an alternative he is entitled to pay such assessment for lighting and cleaning as may be from time to time fixed by the Sub-Commissioner or Collector.

I have no doubt that the occupier is only punishable if, after proper notice, he neglects to light and clean the neighbourhood of his house, and that if the Crown has any right at all to recover a rate against him it must be a civil right founded upon his election to pay a rate upon an assessment which he has agreed to. This point has been quite lost sight of in these proceedings as it appears that neither party wishes the occupier to undertake the lighting and cleaning on his own account, and the whole case has been allowed to turn on the question whether the Applicants should be rated on the actual rent that they pay or on the value of their premises as assessed by the authorities.

Public notice has been given that persons electing to pay a rate will be charged according to a certain scale on their annual rent, and I think it is clear that the meaning of "annual rent" in this connection is really "annual value." So far, I agree with the learned Town Magistrate, but although the Sub-Commissioner may from time to time fix assessments, I think that in doing so he is acting in a *quasi* judicial capacity, and having publicly announced the terms upon which he is willing to assess premises he is bound by his notice until it is withdrawn.

The question of value, therefore, becomes a question of fact to be determined between the parties. If the occupier is dissatisfied he can decline to pay the rate and can elect to clean and light his own premises and on failure to perform that duty he can be punished.

The Crown has sought what is really a civil judgment by means of criminal proceedings and I must annul the order in this case as irregular.

I hope that in any rules that may be made under the new Municipal Ordinance proper machinery will be provided for determining questions of assessment by civil process.

(*Order Revised.*)

CRIMINAL CONFIRMATION.

Before JUDGES CATOR and HAMILTON.

REX *v.* MIANGA WA MWANGA and FOUR OTHERS. CR.C. $\frac{2}{1903}$

Sentences of collective punishment in the case of wild tribes.

Held.—Where it is practically impossible to identify and convict individual members of wild native tribes in cases of dacoity, the High Court will not interfere with a sentence of collective punishment on a community, who have shared in the proceeds of the dacoity.

In this case two Somali traders laid a complaint before the Collector Kitui that they had been attacked and robbed of six head of cattle, by natives of the Yatta district. The Collector sent to the Yatta people to come in, and on their refusing, surprised the villages neighbouring the scene of the dacoity, took five persons prisoners, and seized 41 head of cattle.

Among the cattle taken two were identified as the property of the Somalis who had been robbed.

The Collector convicted the five prisoners of receiving property acquired by dacoity, and imposed a fine of Rs.300, and ordered the two beasts identified to be returned to the Somalis together with a sum of Rs.200 out of the fine.

He also passed sentence of ten months' rigorous imprisonment on the prisoners.

The case was forwarded in due course to the High Court for confirmation.

After some correspondence with the Collector, the High Court passed the following order:—

"We confirm the conviction in this case, but vary the punish-
" ment to the extent of ordering that on payment of an additional
" sum of Rs.300 the prisoners may be released." *

NOTE.—The covering letter returning the Order of the High Court to the Collector contained the following paragraphs on the subject of collective punishments:—

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" The general lines that are now laid down for guidance in " cases similar to this are :

" (1) That the High Court will not interfere with an order " punishing a community collectively where an offence which " has clearly been committed by one or more members of that " community cannot be definitely brought home to the actual " perpetrators.

" (2) Where, as in this case, certain members of the " community, to which the persons who committed the offence " belong, are arrested, a sentence of imprisonment on them " should as a rule contain an order that the imprisonment will " be remitted on payment of an increased fine.

" By this means the punishment would be equitably distri- " buted as far as possible and the community that were punished " would afterwards be able to square their accounts between " themselves."

BANKRUPTCY.

Before JUDGE CATOR.

RECEIVER OF ANZOULATOS *v.* SECRETARY OF STATE. B. 8/1903

Right to set-off claim by a Government Department in East Africa Protectorate against debt due from a Government Department in Uganda Protectorate.

Held—There is no set-off in such cases.

Mr. C. M. DALAL *for Receiver.*

Mr. G. H. MEAD *for Defendant.*

JUDGE CATOR.—This is a perplexing question that has been submitted to me by way of a special case.

The facts are sufficiently detailed in the case and I need not recapitulate them.

The question is whether a sum of money due from the Government under a contract made by the bankrupt with the Director of Transport for the Uganda Protectorate can be set off against a sum of money due from the bankrupt to the Uganda Railway authorities.

There can be no question that both the Director of Uganda Transport and the Chief Engineer of the Uganda Railway are but the Agents of the Crown if their authority be traced to its source and it is upon this ground that the Crown claims a right of set off.

The learned pleaders who argued the case before me were unable to furnish me with much authority, and my own diligence, supplemented by that of the Registrar, has failed to disinter any case that is quite in point, so that I am almost in the enviable position Lord Westbury sighed for when he declared that English law would not be very difficult of application if there were no decided cases.

With some hesitation I have come to the conclusion that the Receiver's contention is right. The position taken up by the Crown is plausible and I think that if the Agents of the Crown had been respectively the Railway authorities and one of the departments of the East Africa Protectorate the Crown would succeed, but there is a great difference between a department of this Protectorate and an independent Protectorate like Uganda.

The true test appears to me to be this: Could the bankrupt have sued the Uganda Protectorate in this Court? It seems to me that he could not. So far as this Court is concerned Uganda is as much a foreign country as France, and it is clear that I could not entertain a suit against the French Government as such.

It is true that Section 230 of the Contract Act gives a right to a creditor to sue an agent when the principal cannot be sued, and I think that the bankrupt might have sued the Director of Transport personally by virtue of that provision, but if the Uganda Protectorate refused to indemnify their servant the judgment creditor would have no greater rights against the Protectorate by virtue of his judgment than he had before and would only be entitled to issue execution against the property of the Director of Transport even though the Director might at the time have funds of the Protectorate in his hands.

It hardly needs demonstration that there can be no set-off of a claim that could not be enforced in this Court. Consequently I hold that the claim of the bankrupt against the Director of Transport cannot be set off against the bankrupt's debt to the railway.

(*Summons dismissed.*)

APPELLATE CRIMINAL.

Before JUDGE CATOR.

DEVIDITTA *v.* REX. CR. A. $\frac{15}{1903}$

Vagrancy Regulations 3 of 1900—Criminal Procedure Code, Act V. of 1898, Section 109—Security for good behaviour—Scope of Vagrancy Regulations.

Held—The Vagrancy Regulations are primarily intended for the repatriation of destitute British subjects. Rigorous imprisonment cannot be given for vagrancy only in first instance. Bad characters should be proceeded against under the Criminal Procedure Code.

The accused, an Indian, was convicted by the Sub-Commissioner, Naivasha, under the Vagrancy Regulations of being a vagrant and sentenced to three months' rigorous imprisonment. From this conviction he appealed.

C. M. DALAL *for Appellant.*

Mr. J. W. BARTH, *Crown Advocate, for Crown.*

JUDGE CATOR.—This is an application to set aside the order of the Provincial Court of Naivasha whereby one Deviditta was sentenced to 3 months' rigorous imprisonment as a vagrant. The Crown admits that it cannot support the order.

The accused was charged under the Vagrancy Regulations 1900.

A vagrant is defined in those Regulations as a person found asking for alms or wandering about without any employment or visible means of support. The evidence hardly justified the Magistrate in finding Appellant to be a vagrant, although it proved him to be a man of bad character and the procedure that should have been adopted is that contained in Chapter VIII. of the Criminal Procedure Code if it was necessary to get rid of him.

A man declared to be a vagrant under the Vagrancy Regulations can only be committed to prison until such time as he has earned a passage money to his native country at a rate of pay that may in no case be less than half a rupee a day, and it is expressly declared that he shall

not wear prison dress nor shall he be lodged with criminal prisoners unless the Magistrates make a special order.

The Regulations are intended primarily to provide for the return of destitute Europeans to their own country and are certainly not intended to be used for the purposes of punishment. Bad characters can be dealt with without difficulty under the Criminal Procedure Code.

The Magistrate in this case condemned the Appellant to a term of rigorous imprisonment in the face of the plain directions to the contrary contained in the Regulations, and consequently the conviction must be quashed.

(*Appeal allowed.*)

APPELLATE CIVIL.

Before JUDGE CATOR.

MOHAMED BIN ABDULLA (Appellant) C.A. 19/1903
v.
MWANA MKUU BINTI HUSSEIN (Respondent).

Sheriah—Distinction between two forms of gift, "Hiba" and "Nathiri"—Possession by donee not necessary in nathiri.

Mohamed bin Abdulla as Wasi of the estate of Shidi binti Ahamed put up for sale a house to which Mwana Mkuu laid claim, tracing her title back to an original gift (nathiri) to one Ghaniya binti Hamis. Mwana Mkuu thereupon sued the Wasi, and having produced satisfactory documentary evidence of the original gift, obtained a judgment in her favour.

Against this judgment the Wasi appealed on the ground that by Sheriah possession by the donee was necessary to perfect title.

JUDGE CATOR.—In this case I am asked to declare that a certain gift of a house is bad because the donee was not put into possession.

Possession is essential in order to perfect an ordinary gift or "hiba," but I am assured by the Sheikh-ul-Islam that when the gift is made as a "nathiri," as in this instance, it is good without any further formality.

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The Sheikh tells me that "nathiri" is equivalent to "Sadaka," and that being the case, the distinction between the two forms of gifts is clear and intelligible. Moreover, it harmonises with the rules of Anglo-Mahomedan law as administered in India, which admit the validity of charitable gifts even although unaccompanied by possession.

I must dismiss the appeal with costs.

(*Appeal dismissed.*)

ORIGINAL CIVIL.

Before JUDGE CATOR.

ISAJI ALIBHOY *v.* A. M. JEEVANJI & Co. O.C. 29/1903

Stay of execution pending appeal—Civil Procedure Code, Section 545—Rules of Court of Appeal for Eastern Africa, 1904.

Held—High Court has concurrent jurisdiction with Court of Appeal to grant stay.

The Plaintiff obtained a decree against the Defendant Company in the High Court, against which the latter lodged with the High Court an appeal to the Appeal Court as provided by the Rules; and on Plaintiff applying for execution, Defendants asked for a stay pending the appeal.

C. M. DALAL *for the Plaintiff—Applicant.*

Mr. O. TONKS *for the Defendants.*

The points raised were decided as follows:—

That after the time for appealing has expired and an appeal has been lodged, the Appellate Court alone has jurisdiction to stay execution under the provisions of Section 545.

But that in an appeal to the Eastern Africa Appeals Court the provisions of the Code regarding procedure on appeal do not apply, and the Rules of Court published in the "Gazette" of the 1st May, 1904, form a complete code in themselves.

That under Rule 24 of the Rules of Court, the Court from which an appeal is being preferred has a concurrent jurisdiction with the Appeals Court in granting a stay of execution.

(*Stay granted.*)

CRIMINAL REVISION.

Before JUDGE CATOR.

CROWN *v.* LOHIRA WA ESANDYI. CR.C. $\frac{31}{1903}$

Special Courts created by the Native Courts Amendment Ordinance 31 of 1902—Procedure in.

In this case the accused was convicted in the Special Court of the Collector at Dagoretti of using criminal force under Section 352 of the Indian Penal Code, which section permits of a maximum punishment of three months' imprisonment being inflicted.

The Collector passed a sentence of 18 months' imprisonment and 25 lashes, which sentence was forwarded in due course for confirmation by the High Court.

The following order was passed by the High Court.

JUDGE CATOR.—I Reduce the sentence to three months' imprisonment (the maximum allowed by the Code) and twenty-five lashes. It is only for special reasons that the limits of punishment provided by the Code should be exceeded and I see no special reason in this case.

NOTE.—*Cf.* Art. 10, Section 2, Ordinance 31 of 1902. Officers holding "special Native Courts" should remember that the jurisdiction given by the Ordinance should in all cases as far as possible be exercised in accordance with the laws of the Protectorate. The number of lashes should not exceed 24. *Vide* circular to Magistrates, p. 156.

ORIGINAL CIVIL.

Before JUDGE CATOR.

MZEE BIN ALI *v.* ALLIBHOY NURBHOY. O.C. $\frac{34}{1903}$

Specific performance of agreement relating to land—Suit between native and British subject in Sultan's dominions—Indian Land Transfer Act—*lex loci rei sitæ*—*Charlesworth case—Registration.

Held—Requirement of Indian Land Transfer Act that agreement should be in writing does not apply to natives, and though applying to the Defendant in this case must not be read to the prejudice of Plaintiff, a native. The law to be applied is the local Mahomedan law. The agreement to purchase being conditional Plaintiff has no remedy where possession has not been delivered or a properly worded document of sale written.

Mzee being asked by Allibhoy to obtain for him a certain house freed from an existing tenancy agreed to do so for Rs.1,300. In consequence of this Mzee bought the house from the owner and on getting rid of the tenants sued Allibhoy to compel him to complete the agreement. The action was for specific performance only, the Plaintiff refusing to claim damages.

Mr. O. TONKS *for Plaintiff.*

Mr. R. M. BYRON and BYRAMJI R. *for Defendant.*

JUDGE CATOR.—The Plaintiff in this case is a native who was for several years in the service of Messrs. Charlesworth & Co., and lived in a house which his master rented from a man named Matari bin Salim.

The Plaintiff says that towards the end of the year 1899 the Defendant approached him with a proposal for the purchase of the house and ground, promising that if the Plaintiff could hand over the premises free from encumbrances and in particular free from the tenancy of Messrs. Charlesworth & Co., he would buy them for Rs.1,300. The Plaintiff says that he arranged forthwith for a purchase at the price of Rs.700 of which he paid Rs.400 on the

* NOTE.—*Cf.* Sec. of State *v.* Charlesworth, Pilling & Co. and T. D. Charlesworth P.C. 1900, p. 24.

spot, but that Charlesworth & Co. were not then disposed to give up the house, though I gather that the Plaintiff might have terminated his tenancy at any time had he chosen to do so.

The Vendor subsequently sued the Plaintiff for the balance of the purchase money and obtained a judgment.

Subsequently Messrs. Charlesworth & Co. vacated the premises and the Plaintiff says that he thereupon called on the Defendant to take a conveyance of the property for the agreed sum of Rs.1,300, and that the Defendant refused to fulfil the bargain though he expressed his willingness to buy it at its then value.

The Defendant flatly denies that he made any agreement whatever in relation to the house, and he goes so far as to say that he never had any dealings or conversation with the Plaintiff or even knew him.

One side or the other has committed wilful perjury, and I have come to the conclusion that it is the Defendant who has sworn falsely.

Whether or no the terms of the agreement were precisely those detailed by the Plaintiff I do not know, but I am quite satisfied that some proposal was made. At the time in question the prices of land in the town ruled high and land speculation was rife. The Plaintiff's story is a probable one, and the Plaintiff has produced witnesses to support it. Both he and his witnesses gave me the impression that they were telling the truth, and the production of the file of the proceedings in which the Plaintiff was sued by the Vendor of the property corroborate part of his testimony.

Having come to the conclusion that the Plaintiff's statement of fact is true I have to consider if the agreement which he has proved is one that the law will enforce.

The claim is for specific performance and for specific performance alone. There is no alternative claim for damages, and the Plaintiff, through his pleader, declined to ask for them, and I have, therefore, only to consider if this Court will grant specific relief.

Various sections of the Indian Specific Relief Act were pressed upon my attention in spite of the fact that that Act has not been applied in this Protectorate, and that if the case is not governed by the Mahomedan Law it must be decided, according to the principles upon which specific relief is granted by the English Equity Courts. According to those principles I think that if the Plaintiff had come to the Court with promptitude he would have obtained an order, but that, as a matter of fact, his action would have been dismissed on the ground that he had slept on his rights.

It was furthermore argued for the defence that the agreement was invalid because it was not in writing. The Indian Transfer of

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Property Act is in force in this Protectorate, and one of the sections of that Act requires that agreements for the sale of land, when the consideration money is over Rs.100, must be registered, and I am asked to say that as a corollary to this requirement that such agreements must be in writing.

I think this reasoning is sound in the case of agreements between non-natives, but where, as in this case, one of the parties is a British subject and the other is a native, I think the rule cannot be applied to the prejudice of the native who is not affected by the Act, though possibly it might be a bar to an action if the position of the parties were reversed.

In my opinion, however, the case must be decided neither by Indian nor by English law. The agreement relates to land in Mombasa, and it has been decided by the Privy Council that the rules of law to be applied to such agreements, even when both the litigants are English, are the rules of the local Mahomedan Law.

I regret to say that I have not had the advantage of hearing any serious discussion of that law in Court, but I have considered the point with the Sheikh ul Islam and he assures me that the Plaintiff has no remedy under the Sheriah. If the Plaintiff had been the Defendant's agent, and had been ordered by the Defendant to make the purchase, the Plaintiff could have compelled the Defendant to make a Transfer, but inasmuch as the transaction was merely an agreement conditional on certain eventualities, the Plaintiff cannot succeed. A properly worded document or a delivery of the land with the requisite formalities is essential in the case of a bargain for the purchase of land. I am satisfied that the opinion of the Sheikh ul Islam is correct, and although the Plaintiff may have a good moral claim he has no legal right against the Defendant.

I must dismiss the action, but in view of the conclusion that I have come to regarding the credibility of the Defendant I allow no costs.

In the course of the trial it has transpired that the Plaintiff has not yet obtained a conveyance of the land though he has paid the purchase money for it and has taken a document under which he is entitled to call for a transfer to his nominee. This document has not been registered, as it should have been, and under the circumstances of the case I must send it on to the Registrar with a recommendation that he should impose an exemplary penalty for non-registration.

(*Action dismissed.*)

APPELLATE CIVIL.

Before JUDGE HAMILTON.

HASHAM KANJI & Co. (Appellants) C.A. 1/1904

v.

ADMINISTRATOR FEROZ DIN, *deceased* (Respondent).

Indian Stamp Act.—As applied to East Africa by order of Secretary of State, May, 1899—Admissibility of unstamped receipts—Admitted in original action objected to on appeal.

Held—Unstamped receipts are admissible in evidence in East Africa. Documents admitted in Lower Court will not be rejected by Appellate Court on ground of not being stamped.

Feroz Din having died, the Administrator of his estate found amongst his papers two unstamped deposit receipt notes for Rs.550 and Rs.200 respectively, signed by a partner in Hasham Kanji & Co. On these the Administrator sued that Firm in the Nairobi Provincial Court to recover their value. Judgment was given for the Plaintiff.

Against this judgment Hasham Kanji appealed on various grounds, and, amongst others, on the ground that the notes not being stamped were inadmissible as evidence of the debt.

C. M. DALAL *for Appellants.*

These documents were not duly stamped as defined in Section 2 Sub-section 11 of the Stamp Act, they were not stamped before or at the time of execution as required by Section 17. That being so they are not admissible in evidence under Section 35.

Although they were admitted in the Provincial Court and Section 36 would appear to prevent the question of their admissibility being raised on Appeal, that is not so if Sections 36 and 61 are read together. Further, Section 36 cannot refer to a case where no discretion is left.

HASHAM KANJI & Co. v. Admr. FEROZ DIN. C.A. 1/1904.

He cited the following authorities :—

Krishnaji Narayan Parkhi *v.* Rajmal Manikchand Marwadi (1); Ralli and others *v.* Karamala Fazal (2); Jethibhai *v.* Ramchandra Narottam (3).

Mr. O. TONKS *for Respondent.*

Section 5 of Order applying Indian Stamp Act to East Africa takes out the proviso to Section 35 of Indian Stamp Act 1899, which was formerly Section 34 of Act of 1879.

This Section reads as follows :—

" Any instrument to which the first proviso in Section 34 of " the said Act applies may be admitted in evidence on payment of " the duty with or without penalty as the Court thinks fit in the " circumstances of the case " . . . . . .

Section 61 of the Stamp Act does not allow an Appeal Court to alter an order as to the admissibility of a document made in the Court of first instance.

JUDGE HAMILTON. — As regards the arguments of the Appellants, that the notes are inadmissible, I am of opinion that this Court is precluded from entering into the question on the following grounds :—

The order of the Secretary of State, dated 25th May, 1899, bringing into force the Indian Stamp Act of 1879, and its amending Acts specially provides in Clause 5, that documents mentioned in the first proviso in Section 34 of the Act of 1879 (which is now Section 35 of the Act of 1899) may be admitted in evidence. Secondly, Sections 36 and 61 of the Act of 1899 do not empower an Appellate Court to call in question the admissibility of a document that has been admitted in the Lower Court on the ground that it has not been duly stamped. Section 36 expressly restrains the Appellate Court from questioning admissibility on such grounds, and Section 61 limits the right of an Appellate Court to interference for the protection of revenue only. . . . . .

(*Appeal dismissed.*)

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(1) I.L.R. Bombay, XXIV.
(2) I.L.R. „ XIV.
(3) I.L.R. „ XIII.

CRIMINAL REVISION.

Before JUDGES CATOR and HAMILTON.

GASI WA JAKA *v.* MAGATO MANZI. CR.R. $\frac{2}{1904}$

Indian Penal Code (Act XLV. of 1860) Section 498—Enticing away a married woman—Native custom—Remedy of aggrieved party.

Held—Regard should be had in the case of natives to the custom of seeking compensation for adultery by civil action.

In this case tried by the Collector at Shimoni the complainant was permitted to initiate a criminal prosecution against the accused under Section 498 of the Indian Penal Code for having some years before enticed away a married woman.

The case having come to the notice of the High Court the Collector was asked to furnish a report.

The Court thereafter delivered the judgment following :—

We have now received the Collector's report on this case and after giving the whole matter our careful consideration we have come to the conclusion that the conviction cannot be sustained.

There is some conflict of evidence, but the Collector does not discuss it nor has he noted the demeanour of the witnesses or given us any idea as to which of them appeared to be speaking the truth. In the absence of any assistance of this kind the facts appear to us to be somewhat as follows :—

The woman Vesi was the wife or Suria of the complainant Gasi and some time ago left him of her own accord and went to live with her brother Mvesi. She says that she ran away because Gasi ill-treated her. Gasi seems to have taken no steps to recover her at that time and subsequently she went to live with the accused Magato as his wife. Magato says that he took her as his wife from the brother Mvesi and paid money for her and we are inclined to believe that he did so, though Mvesi denies the allegation.

At this stage Gasi applied for the return of Vesi and Kubo the Digo chief ordered Magato to return her, but Magato disobeyed the order on the ground that the woman was his wife.

These wife shauris are common enough amongst the Wanyika and other savage tribes and are almost invariably dealt with according to native custom and in civil actions, but in this case the man

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Magato has been prosecuted criminally under a special section of the Indian Penal Code for enticing away a married woman.

This being a penal section must be construed strictly. Consequently, the marriage of Gasi and Vesi needs proof, and so does the enticing away of the wife from the husband.

The file does not disclose what is the religion of any of the parties, or how, where or when Gasi and Vesi were married, but even assuming that they actually were man and wife it seems to us that the charge of enticing her away must fall to the ground. The evidence goes to show that she ran away from Gasi and went to live with her brother, and that it was while she was living independently with him that she went off with the accused. She may have been enticed away from her brother, but certainly not from her husband.

On this ground and in exercise of our powers of revision we quash the conviction and direct the release of the accused.

We consider that criminal prosecutions in wife shauris should be only resorted to in very special cases. Disputes about wives should usually form the subject of civil actions, and unless the native customs relating to them are known very intimately to the Judge, he should take the opinions of native assessors and record them on the file.

(*Conviction quashed.*)

NOTE.—*Cf.* Rex *v.* Ferjulla Desur, pp. 79, 80.

CRIMINAL REVISION.

Before JUDGES CATOR and HAMILTON.

ALIDINA VISRAM *v.* SULIMAN s/o JAN MAHOMED and others. Cr.R. 3/1904

Criminal Procedure Code (Act V. of 1898) Section 548—Practice—Payment for copies of record.

Held—copies must be paid for unless granted free by the Court for special reasons.

Per curiam. This is a point of practice of considerable interest to the public.

The prosecutor has made an application in revision supported by an affidavit to set aside an order of the Town Magistrate, and

the question before us is whether he must furnish a copy of the affidavit to the accused free of cost.

We think that the case is covered by Section 548 of the Criminal Procedure Code which provides that any person affected by a Judgment or order of a Criminal Court shall be entitled to a copy of any part of the record provided that he pays for it, unless for any special reason the Court furnishes it free of cost. No special reason has been shown in this case and the Respondents must consequently pay for the documents required.

The only copies which an accused person is entitled to get free of charge are a copy of the Judgment in cases other than summons cases, and a copy of the Heads of charge to a jury in a Sessions Trial as provided by Section 371 of the Code.

CRIMINAL REVISION.

Before JUDGE CATOR.

ALIDINA VISRAM *v.* SULIMAN AND OTHERS. Cr.R. 5/1904

Criminal Procedure Code (Act V. of 1898) Section 94—Application by Defence for discovery of documents in the hands of the prosecution.

Held—Defence is not entitled to make an application for discovery until accused person has been formally charged. Such application would then have to be definite and particular and not general.

Mr. W. A. BURN and Mr. O. TONKS *for Applicant.*

C. M. DALAL *for Respondents.*

JUDGE CATOR.—This is an application made by certain persons accused of criminal breach of trust in regard to partnership property.

An information has been sworn upon which a warrant has been issued and the accused have been admitted to bail, but the Magistrate has not yet held any inquiry.

On the 29th of April the accused's pleader gave notice to the complainant's pleader that he would apply under Section 94 of the Criminal Procedure Code for the production and inspection of all "books, documents, &c., relating to transactions between the parties now in prosecutor's possession." The application was made on the following day and after hearing the pleaders the Magistrate delivered the following judgment.

"In my opinion Mr. Burn and Mr. Tonks have made out a "*prima facie* case for the production and inspection of such documents "in the possession of the Prosecutor as relate to the charges brought "against the accused. It being necessarily within the knowledge "of the prosecution what those books are, I regard the appli- "cation as a definite one. The private papers asked for are set out "in a list.

"Upon the merits of the case Mr. Dalal tells me an affidavit is "necessary to support the application. I do not see any provision in "Section 94 for it. Mr. Dalal has used a great number of arguments, "but as he cites no authority in support of any of them I allow the "application and order a summons to issue to the prosecutors to "produce and lodge in Court at 2 p.m. on Monday, 2nd May (1) all "books and papers in their possession bearing upon the charges "against the accused; and (2) all the private papers of the accused in "possession of the prosecutors."

It is this order that I am asked to revise.

Section 94 (1) of the Procedure Code under which the order is made runs as follows:—

"Whenever any Court, or, in any place beyond the limits of the "towns of Calcutta and Bombay, any officer in charge of a police- "station considers that the production of any document or other thing is "necessary or desirable for the purposes of any investigation, inquiry, "trial or other proceeding under this Code by or before such Court or "officer, such Court may issue a summons, or such officer a written "order, to the person in whose possession or power such document or "thing is believed to be, requiring him to attend and produce it, at "the time and place stated in the summons or order."

The section gives the Court the fullest power to compel the production of any document that it may consider desirable for the purposes of any investigation, inquiry, trial or other proceeding and probably this power might be invoked by the accused at a proper

stage in the proceedings, but I have come to the conclusion that the object of the section is primarily to assist the prosecution and that the application in this case by the accused was, to say the least of it, premature.

In the first place it is to be noticed that the power to compel production is given not only to the Court but to any officer in charge of a police station, the whole language of the Section seems to me to indicate that it is intended as an aid to the detection and punishment of crime. The only reported cases relate to the right of the prosecution to compel production by the accused, but the full and instructive judgments of Norris and Ghose J. J. in the case of Mohamed Jackariah *v.* Ahmed Mohamed (15 Calcutta 109) throw a good deal of light on the object of the section, and I have not been able to find a hint or suggestion that the accused has any general right to call for production of documents or things in the hands of the Prosecution. If such a right existed, I cannot but think that the Reports would teem with cases relating to applications of this nature, as the first thing every accused person would do would be to ask that the Crown should be compelled to lodge in Court all documents and things in its possession relating to the offence alleged against him.

The suggestion made by the accused that they cannot prepare their defence without these documents is an idle one inasmuch as they are not yet called upon to make any. They can withhold cross-examination of the Complainant's witnesses until the whole case of the Prosecution has been developed, and if by that time the papers that they wish to see have not been produced in Court and a charge has been framed against them they might perhaps be justified in asking the Magistrate to compel discovery of documents likely to be relevant to their case. But even then I think that they would have to explain in what way any document would be likely to help them and it would have to be specified with reasonable particularity on the Magistrate's summons.

For these reasons I allow the application and direct that the Magistrate's summons be cancelled.

(*Magistrate's order revised.*)

CRIMINAL REVISION.

Before JUDGES CATOR and HAMILTON.

REX *v.* KUFA KULALA and 10 others. CR.R. $\frac{6}{1904}$

Indian Penal Code (Act XLV. of 1860), Section 492—Native Porters and Labour Regulations (3 of 1902)—Contract in writing—Engagement as porter—Engagement as coolie—Registration List.

Held—A mere Registration List is not a contract in writing as required by the Indian Code and the Local Regulations. The employer having engaged men as porters cannot prosecute for breach of contract if he thereafter puts them to other work.

This case was originally tried by the Collector at Nairobi, and the circumstances under which the Collector convicted accused for breach of contract under Section 492 being brought to the notice of the High Court it was dealt with by them under their powers of revision.

JUDGES CATOR and HAMILTON.—This is a case in which eleven coast natives were sentenced by the Collector at Nairobi to one month's hard labour and a fine under Section 492 of the Indian Penal Code for breach of contract

Section 492 permits the infliction of a limited punishment on an artificer, workman or labourer who being bound by a lawful contract in writing to work for another person and having been conveyed to his place of work at the expense of his employer deserts his employer's service or refuses to work without reasonable cause, provided that the employer has not ill-treated the servant or neglected to perform his own part of the contract.

In addition to this provision in the Penal Code we have certain special provisions respecting native servants contained in the Native Porters and Labour Regulations, 1902 (No. 3 of 1902). These regulations deal separately with caravan porters and with other native servants, and contain a number of provisions designed to

ensure the proper treatment of the servants. The first part deals only with caravan porters and provides that the Registering Officer shall see that the regulations are complied with, that he shall give certain explanations to the porters, and that the porters are to be provided with such equipment as the Registrar may by rules prescribe, or in the absence of rules, with such as is specified in the Regulations, including sufficient tent accommodation and cooking pots. It is also laid down that every caravan engagement shall be deemed to be for a trip unless specially stipulated to the contrary.

Part II. of the regulations provides that any contract for service exceeding two months shall be in writing and registered before a Registering Officer and the contract must contain certain prescribed particulars.

In the case now before us the Uganda Railway Permanent Way Inspector at the Athi River acting, as he says, on the instructions of his district engineer, prosecuted the accused through the police for desertion. He stated that the men arrived at Athi River on the 24th and worked until the 29th or 30th when they deserted. The men complained that (1) they were beaten, that (2) they had no sleeping accommodation, and that (3) they had no cooking utensils. The first complaint is denied, but the third appears to be perfectly well founded and the second is partially admitted.

No registration papers were produced at the first hearing and the Collector remanded the case no less than four times for their production. Eventually they were produced and examined by the Magistrate who noted that the names of some of the accused did not appear on the list, but in view of the admissions of the accused that they had all been engaged together at Mombasa he assumed that they might have been entered under other names. He did not frame a formal charge but found them guilty under Section 492. It does not appear that he considered whether there was any contract in writing as required by that section, nor has he discussed the question as to whether the Porters' regulations were complied with.

It is quite clear that there have been serious infractions of the Porters' regulations in this case. We observe that the word coolie has been inserted in the list under the column headed "rating," and perhaps this may be taken as an indication that they were not intended to do Porters' work, but the memorandum at the head of the list states that they are porters registered under the Porters and Labour regulations to accompany a caravan fitted out by the Uganda Railway proceeding to Nairobi and likely to be away from the

REX v. KUFA KULALA AND 10 OTHERS. CR.R. 6/1904.

coast for a year, and it is clear that they did not receive their prescribed equipment as porters and they entered into no contract in writing as servants.

It is not necessary for us to enter into the question of how the men were actually treated, but we cannot agree with the Collector that a desertion of 30 out of 86 is to be treated as an insignificant fraction of discontented men.

It is enough for us to say that there is nothing that can be called a contract in writing to satisfy the requirements of either Section 492 of the Penal Code or of the Native Porters and Labour Regulations. The conviction must be quashed and the men liberated, and if any of the fines have been paid the money must be returned.

(*Conviction quashed.*)

CRIMINAL REVISION

Before JUDGES CATOR and HAMILTON.

RAJAB ALI AND OTHERS v. ALIDINA VISRAM. CR.R. 7/1904

Criminal Procedure Code (Act V. of 1898) Sections 254, 257—Recalling witnesses for the prosecution for cross-examination.

Held—Witnesses for the prosecution do not when cross-examined become witnesses for the defence; the cost of producing them therefore, when duly called for by the defence for the purpose of cross-examination, must be borne by the prosecution.

In the course of a long criminal prosecution certain witnesses for the prosecution in the Magistrate's Court, after giving their evidence in chief, were allowed to return up country. On the case being resumed, the defence duly claimed their right to cross-examine them. On this the Magistrate ordered that the cost of bringing them down to Mombasa must be borne by the defence, who required their attendance.

The defence applied for a revision of this order to the High Court.

Mr. W. A. BURN and Mr. O. TONKS *for Applicants.*

C. M. DALAL for Alidina Visram.

JUDGES CATOR and HAMILTON.—This case raises an important question in relation to Criminal Prosecutions.

The applicants are being prosecuted by the Respondent before the Town Magistrate of Mombasa. The proceedings have dragged on for several months. At the end of the examination of each of the witnesses for the prosecution, the defence elected to reserve the cross-examination.

Many of the witnesses live up country, and after they had been examined the Magistrate informed them that they could leave Mombasa, and that if they were wanted again they would be summoned, but it was no doubt present to the mind of all parties that they would probably be required later for the purpose of being cross-examined.

The Town Magistrate framed charges against the accused on the 29th of June, 1904, to which they pleaded not guilty. He did not ask them at that time to state what witnesses for the prosecution they desired to cross-examine, and a long adjournment ensued during which a change took place in the occupant of the Bench.

On the 8th of August the proceedings were resumed, when the accused were called upon to specify the witnesses that they required to be recalled for cross-examination. They have given a list of fourteen persons, of whom seven are up country and one in Zanzibar and the question that we have to decide is whether the expense of recalling these witnesses should fall upon the prosecution or the defence.

The Magistrate has found that the long adjournment in this case was made at the request of the accused's pleader and that consequently the accused must pay the expenses of recalling the witnesses, and we are asked to reverse this order.

Under Section 254 of the Code the Magistrate may at any stage of the case for the prosecution frame a charge against the accused, although in practice this is usually done when all the evidence for the prosecution has been taken. When the charge has been framed the accused is required to plead. If he does not plead guilty he is required to state if he wishes to cross-examine any of the witnesses for the prosecution, and if he calls for them they must be produced for cross-examination, and when cross-examined and re-examined must be discharged.

If there are any further witnesses for the prosecution they must then be produced, examined, cross-examined, re-examined and discharged.

Section 257 provides that if the accused, after he has entered upon his defence, applies for process to compel the attendance of a witness the Magistrate shall issue process unless he thinks the application is made for the purpose of vexation or delay, provided that if the accused has had an opportunity of cross-examining after the charge has been framed the Magistrate shall only grant process if he thinks it necessary for the purposes of justice. And as regards any application made under this section the applicant may be called upon to deposit in Court a reasonable sum of money to cover the witnesses' expenses.

The substance of this is that the accused is entitled to have an opportunity given him, immediately after the charge has been framed, of cross-examining the witnesses called by the Prosecution. If he has such an opportunity and does not exercise his right at the time he may lose it altogether, or he may be required to pay the costs of calling the witnesses.

The question before us consequently resolves itself into one of fact. Had the accused an opportunity of cross-examining the witnesses? The Magistrate implies that they had, though he does not say so in terms, but we think he is not quite justified in putting the case as high as that.

The proceedings were initiated on the 12th of April last. The case for the prosecution was opened on the 17th of May; further evidence was taken on the 28th of the same month, and the hearing was continued on the 13th, 20th, 24th and 27th of June, when the case for the prosecution was closed. On the 29th of June the charges were framed and the accused pleaded not guilty, and the case was adjourned by consent until the 8th of August.

There is nothing to show that the up-country witnesses were available for cross-examination immediately after the charges were framed, and the facts appear to be that they were not in Mombasa. If they had been offered for cross-examination we should have concurred in the Magistrate's decision, but inasmuch as no opportunity for cross-examination has been afforded, subsequently to the framing of the charges, we think that the cost of producing the witnesses must fall on the prosecution. The Magistrate is of course aware that in a proper case he can issue a commission to save expense.

We make no order as to costs.

(*Application granted.*)

APPELLATE CRIMINAL.

Before JUDGE CATOR.

ATTA MAHOMED AND THREE OTHERS *v.* REX. Cr.A. $\frac{9}{1904}$

Criminal Procedure Code (Act V. of 1898) Sections 190–191—Indian Penal Code (Act XLV. of 1860).—Complaint—Jurisdiction of Magistrate—Procedure—Hospital guard public servant—Arrest of railway servants without notice to the Head of Department.

Held—In the absence of evidence to the contrary a Sergeant-Instructor of Police is a Police officer authorised to make arrests and Reports—the Town Magistrate Kisumu proceeded correctly on a Report made by a Sergeant-Instructor (under Section 190 (1) *b*) in hearing the case himself. An assault on an askari on guard at a hospital justifies a conviction under Section 353. Arrests, particularly of railway servants, should not be made by the Police when a summons will meet the necessities of the case, notice of arrest of a railway employé should be given to his superior officer.

C. M. DALAL *for Appellants.*

Mr. J. W. BARTH (Crown Advocate) *for Crown.*

JUDGE CATOR.—The Appellants in this case have been convicted of assaulting an askari while in the execution of his duty, and I am of opinion that the conviction is right, but under all the circumstances I consider that the punishment is excessive. It is difficult to say exactly how the trouble began, but it ended in a free fight between the askaris and a number of Indian railway employés.

It is true that one of the askaris at any rate was on duty, but the fighting was only remotely connected with that fact. It was not like an interference with a process server or policeman for the purpose of hindering him in his work, which offence would necessarily entail a very severe sentence, but it was rather in the nature of a faction fight.

Unfortunately the magistrate has taken no medical evidence as to the nature of the blows inflicted on either the police or the accused, and I cannot see any note or memorandum on the file to

justify him in saying, as he does, that there were no marks on the accused and obvious marks on the askaris. I observe, too, that one of the askaris who was in the hospital at the time of the fight was not called as a witness.

Mr. Dalal took the point on appeal that the learned magistrate was precluded by Section 191 of the Code from hearing this case, inasmuch as he had taken cognizance of it himself. This contention was raised in the Lower Court and there is a note on the file that "Mr. Hakim moves proceedings under Section 191." In his judgment the Magistrate says that he had ruled that the proceedings were justified by Section 190 (*c*), and that Mr. Hakim had waived his rights, if any, under Section 191. All this is very puzzling. There is no note of Mr. Hakim's waiver unless the word "moves" was written in error for "waives" and I do not understand how proceedings could be "justified by Section 190 (*c*)." It is laid down that a Magistrate may take cognizance of offences on various information, but that if he does so under Sub-Section c, the accused has a right to be tried before another Magistrate. The three classes of information upon which a Magistrate may act are (*a*) Upon receiving a complaint of facts which constitute an offence, (*b*) Upon a police report of facts, (*c*) Upon information received from any person other than a police officer or upon his own knowledge or suspicion that an offence has been committed.

It is not quite easy to say what differentiates (*a*) from (*c*), but I take it that (*a*) relates to complaints made openly to the Magistrate, whereas (*c*) is intended to cover only such cases as come to the Magistrate's ears casually or through anonymous or confidential communications.

Applying this test it seems to me clear that if this case was not instituted under (*b*) it was instituted under (*a*), so that the Magistrate was entitled to try it whether there was any waiver on the part of the accused or not.

But as a matter of fact I think that this must be taken to be an information under (*b*). It is suggested that Sergeant Milton, who prosecuted, was not a properly qualified police officer, but I can find nothing on the file to support the allegation. The accused's pleader could easily have ascertained the facts as to Milton's position in cross-examination, but he has not done so, and for the purposes of this case I must assume that he was duly qualified.

Although I must treat this man for the purposes of the case as a police officer it seems that he is not fit for the post. In the first place he disobeyed all inter-departmental regulations as to arresting railway servants while on duty without notice to their superior

officers, and secondly he took advantage in the most reprehensible manner of the fact that the accused were being charged with a cognizable offence, for he made a totally needless arrest on the day following the affray at a time when the accused were at their work. This was obviously a case for a summons and not for an arrest, and I cannot but regret that the Magistrate did not publicly rebuke this official for his oppressive action. After this I need not comment on Milton's admission that he used a kiboko on the accused to bring them to Court.

I confirm the convictions, but I reduce the punishments as follows :—In the cases of Nos. 2, 3 and 4 to fifty rupees fine or in default of payment to two months' rigorous imprisonment, and in the case of No. 1 to Rs.25 fine or one month's rigorous imprisonment.

(*Conviction upheld, sentence reduced.*)

APPELLATE CIVIL.

Before JUDGE CATOR.

MEMSUO BINTI SONGORO (Appellant) C.A. 16/1904

v.

FUNDI HAMADI BIN JOHA (Respondent).

Sheriah—Marriage of slaves—Right of wife to claim divorce on becoming free.

Held—Wife on becoming free may claim divorce at once, if she does not do so it remains with the husband to prove that she has definitely waived her right.

Parties in person.

The two parties were originally both slaves when married. They quarrelled and separated, and the wife when living separate from her husband became free. The husband instituted a suit for restitution of conjugal rights, and succeeded in the first instance

MEMSUO BINTI SONGORO *v.* FUNDI HAMADI BIN JOHA. C.A. 16/1904.

on the ground that the wife by not claiming a divorce when she became entitled to do so lost her right. Against this judgment the wife appealed, and succeeded for the reasons contained in the judgment.

JUDGE CATOR.—This is a case in which the Town Magistrate of Mombasa has granted the Respondent an order for the restitution of conjugal rights against the Appellant.

The parties were married when they were both slaves, but the Appellant subsequently became free. It has been urged that her freedom has not been proved, but she has sworn to the fact, and the Respondent has not attempted to contradict it.

According to Mahomedan Law as soon as the Appellant became free she was entitled to claim a divorce from her slave husband, provided that she applied at once or as soon thereafter as she became acquainted with her right.

The Magistrate finds that she acquired a knowledge of the law after she had quarrelled with her husband, and had left him, and has decided that inasmuch as she took no formal steps to get the marriage annulled and allowed this action to be brought against her she is now precluded from making such a demand.

The Magistrate was advised as to the law by Sheikh Mohamed bin Kassim, whom I have also consulted in the absence of the Sheikh Ul Islam, and I understand from the Sheikh that considerable latitude should be allowed to the woman. I gather from him that it rests with the husband to prove that the wife has with full knowledge elected to live with him and to waive her right to a divorce. The Respondent has not proved that she made any such election, and her conduct was not such as to establish any such presumption, and I have come to the conclusion, though with some little hesitation, that I must allow the appeal, but under the circumstances I give the Appellant no costs.

The action will be dismissed, and the Appellant will obtain a declaration that she is divorced from the husband.

(*Appeal allowed.*)

APPELLATE CIVIL.

Before JUDGE CATOR.

NASORO BIN MOHAMED (Appellant) C.A. $\frac{20}{1904.}$

v.

SALIM B. HAMIS AND OTHERS (Respondents.)

Res Judicata—Second Mortgages Mahomedan Law.

Held—An action having been tried and dismissed in the Liwali's Court, a fresh suit cannot be instituted to try the same matter in the Town Magistrate's Court. Mahomedan Law* does not permit of second mortgages.

Konzi mortgaged a plot of land in Mombasa to Mzee bin Obo, and before the mortgage was paid off mortgaged another plot, including that mortgaged previously, to Rashid Ali Mona. Nasoro paid off the first mortgage, and in return was allowed by Konzi to keep a certain portion of the land covered by the original mortgage on which he had built two houses. Rashid Ali Mona, the second mortgagee, got an order for sale under the second mortgage. The whole of the mortgaged premises were put up to auction, and Salim b. Hamis declared the purchaser. He then brought an action in the Liwali's Court, claiming ground rent for the houses built by Nasoro. That action having been dismissed, he brought an action for the land in the Town Magistrate's Court.

Appellant in person.

Mr. W. A. BURN *for Respondents.*

JUDGE CATOR.—This is a suit relating to the ownership of a plot of ground in Mombasa which formerly belonged to a man named Konzi. Konzi mortgaged it in the first instance to one Mzee bin Obo in 1891, and that mortgage was paid off in or about the year 1898.

* This is a point of considerable importance, as, though only an *obiter dictum* in this case, there is little doubt that this is the law affecting all mortgages in the Sultan's dominions.

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After this mortgage to Mzee bin Obo had been granted, but before it was paid off, Konzi mortgaged other land to Rashid Ali Mona, and the Plaintiff contends that the plot mortgaged to Mzee was also included in the mortgage to Rashid.

Rashid Ali Mona obtained a decree against Konzi for the sale of the land mortgaged to him, and it was sold by auction under an order of the Court to Salim bin Khamis, the Plaintiff in this action.

The Defendant alleges that the plot of ground, on which he had built two houses, was not included in the sale, and he set up a claim to it on the ground that he had paid off the old mortgage to Mzee bin Obo, and had consequently been allowed to keep the land by Konzi.

The Town Magistrate found as a fact that Konzi paid off that mortgage, and treating the land as having been included in Rashid's mortgage, he gave judgment in the Plaintiff's favour and ordered the Defendant to remove his houses.

It was brought to the notice of the Town Magistrate that a few weeks before the institution of the suit in his Court, the Plaintiff had sued the Defendant in the Lewali's Court in respect of the same premises, but the Magistrate makes no reference to that case in his judgment, and it seems to me that he failed to appreciate its importance.

In that action the Plaintiff claimed ground rent for the two houses now in dispute. The whole question of title to the land was raised. The Defendant offered to accept the Plaintiff's oath that the land was included in the property sold under Rashid Ali Mona's decree, and the Plaintiff was at first prepared to swear, but finally declined and put the Defendant to the oath. The Defendant swore formally that the ground in question was not included in the sale, and thereupon the Liwali dismissed the action.

To my mind it is a clear case of *Res Judicata* and the second action should never have been brought.

There is another point which was not referred to in the Lower Court on which I believe the Defendant might have succeeded and it is just as well to mention the matter, although I need not discuss it at length.

The mortgage under which the Plaintiff claims was given while the mortgage to Mzee bin Obo was still in existence, and I think I am right in saying that under these circumstances the second mortgage would, under Mahomedan law, be null and void in respect of any land included in the first mortgage, or at any rate that the consent of the first mortgagee would be required to validate the second.

I only mention this point now as a reminder that professional gentlemen must make themselves acquainted with the law relating to cases which they take up and that they are bound to acquaint the Court with the law in so far as they can ascertain it. As has often been laid down, the primary duty of a barrister is to help the Court, and this is particularly so when he is only allowed to appear on sufferance, as is the case in native suits.

On the ground that the case is *Res Judicata*, I allow the appeal with Court costs in this Court and the Court below, and I allow the Appellant Rs.10 for expenses.

(*Appeal allowed.*)

NOTE.—*Cf.* Ahmed bin Sood *v.* Sherif Omari bin Abdurrehman, p. 80.

CRIMINAL CONFIRMATION.

Before JUDGES CATOR and HAMILTON.

REX *v.* FERJULLA DESUR. CR.C. 35/1904.

Sudanese Customs—Marriage of Deceased Brother's Wife—Evidence to sustain a charge of Adultery.

Held—The Sudanese askaris are nominally subject to law of Islam—Proof must be led of any modification of this law—A brother is bound to support but not necessarily to marry his deceased brother's widow.

JUDGES CATOR and HAMILTON.—In this case the Collector at Kericho has convicted a Sudanese soldier of the offence of adultery under Section 497 of the Penal Code.

The offence was committed with one, Matura, a woman who lives with and is alleged to be the wife of another Sudanese soldier named Sururu Abdulla.

To sustain a charge of adultery, proof of the marriage is indispensable. The Collector took evidence on the point from Sururu, who says that Matura had been bought by his deceased brother as a wife, and on his brother's death, "according to Nubian custom, "Matura became my wife. My brother's name was Abdul bin "Ferjulla. Matura has been my wife for years."

REX *v.* FERJULLA DESUR. CR.C. 85/1904.

The Sudanese soldiery as a rule profess the religion of Islam, and although there is nothing in that religion to prevent a man from marrying his deceased brother's wife, there is no customary obligation that he should do so. It appears, however, that amongst the Sudanese soldiers there does exist a custom that when a man dies his brother shall take charge of the dead man's widow and children. They work for him and he has to support them. But it is quite clear from the testimony of several men who were examined by Mr. Donald on our direction that the widow of a man does not become, *ipso facto*, on his death the wife of his brother.

Furthermore, there can be no legal marriage by Sheriah between a Mohamedan and a savage who does not profess any religion.

Assuming that Matura is a Mohamedan we think that there is sufficient proof of marriage in this case to justify the conviction.

The Collector must take evidence on this point and, subject to his being satisfied thereon, we confirm the sentence.

(*Conviction confirmed*).

NOTE.—*Cf.* however, Gasi wa Jaka *v.* Magato Manzi, pp. 63 and 64. The ordinary rule therein laid down that the remedy in such cases should be by civil action must be relaxed somewhat in respect of the Sudanese, who are of a peculiarly jealous and revengeful nature in matters affecting their women.

ORIGINAL CIVIL.

Before JUDGE CATOR.

AHMED BIN SOOD *v.* SHERIF OMARI BIN ABDURREHMAN. O.C. 49/1904

Native Courts Regulations, 1897, Article 3—Indian Civil Procedure Code, section 43—Walis' Courts practice—*Res Judicata.*

Held—When a matter has been generally litigated in a Wali's Court, the remedy of a dissatisfied party is by way of appeal, and not by the institution of a fresh suit in the High Court.

Ahmed bin Sood brought an action in the Wali's Court at Lamu, in connection with a dispute over the purchase of a shamba from Omari, who had agreed to sell, though interdicted by the Court from so doing. Ahmed obtained a decree for the repayment of Rs.342 (paid by him on account of the purchase money) in monthly instalments of Rs.2. Being dissatisfied with this judgment he instituted a suit in the High Court for Rs.5,100 damages against Omari for failure to complete his bargain. (The minimum amount for which a native defendant can be sued in the High Court must exceed Rs.5,000.)

Mr. W. A. BURN *for Plaintiff.*

Defendant absent.

The Defendant pleaded *Res Judicata* and was allowed to file affidavits in support of his plea.

Mr. W. A. BURN.

The Defendant cannot plead *Res Judicata*. This is a Native Court case governed by the Native Courts Regulations, 1897, Article 3. It is not, therefore, necessary for Plaintiff to sue for all his remedies at once, as required by the Indian Procedure Code. The right to sue for damages is distinct from the right to recover money paid on account.

(Brunsden *v.* Humphery.) (1)

(Roscoe Nisi Prius, 16th Edit., I. 192.)

JUDGE CATOR.—This is a case in which the Plaintiff has filed a suit in the High Court for Rs.5,100 compensation for breach of contract to execute a conveyance of land which the Defendant, it is alleged, agreed to sell for Rs.600.

The object in making so large a claim is that the action might be instituted in the High Court. It is a native case, and there has already been litigation in the matter in the Wali's Court at Lamu. It appears that the Defendant is a spendthrift and a simpleton, and that notice has been issued in Lamu by the Sub-Commissioner forbidding anyone to purchase any of his land without leave. This is a position fully recognised by Arab law and custom. In defiance of this order, the Plaintiff purchased a shamba from the Defendant for Rs.600, and paid certain sums of money on account of the purchase money. The authorities then interfered and stopped the completion of the sale, and the Plaintiff brought an action in the Liwali's Court and obtained a decree for Rs.342 in respect of his advances to be paid by monthly instalments of Rs.2. The Plaintiff was not satisfied with this decision, complaining in particular against the smallness of the instalments, and he was recommended to appeal against the order, but declined to do so, alleging that he would have to appeal to the Sub-Commissioner who had already prejudged the case, and he now brings this action so as to open it *de novo* in the High Court.

The question at once arises as to whether the case is not *Res Judicata* and concluded by the first action. To save expense I have allowed affidavits to be filed upon this preliminary point and have heard Counsel on the Plaintiff's behalf.

Under section 43 of the Civil Procedure Code the Plaintiff would be barred from suing for anything more than he had included

(1) 14 Q.B.D. 141.

AHMED BIN SOOD *v.* SHERIF OMARI BIN ABDURRHMAN. O.C. 49/1904.

in the first action, but Counsel points out that by the provisions of Article 3 of the Native Courts Regulations of 1897 the Procedure Codes are not made binding in native Courts presided over by a Wali. This is true, but I am not quite sure how the parties stand now that action is brought in a native Court presided over by a European.

It is not necessary, however, that I should discuss this point, as I propose to rest my decision upon the broad ground that the question now brought before me has already been substantially litigated and decided in another Court, and being *Res Judicata* that I ought not to reopen it.

Counsel has tried hard to persuade me that the right to recover his purchase money, and the right to recover damages in consequence of the Defendant's refusal to complete his purchase, are different rights which the Plaintiff is entitled to litigate separately, and he cites the case of a cab driver who was held to be entitled to recover in the County Court for damage to his cab and subsequently in the High Court for damage to his person caused by one and the same accident. That case turned upon the question of whether or no there were two distinct causes of action, and it was held by the majority of the Court that there were.

This is a different case, and it appears to me that the right to sue for damages cannot be severed from the right to recover the money paid; moreover, it is not at all clear that the Plaintiff did not claim damages before the Lewali. There are no strict forms of pleading in the Lewali's Courts, and the Plaintiff made a general application for relief and obtained an order for payment of money with which he would no doubt have been content had the whole sum been payable at once. There is provision in the Judgment that the Defendant was to pay more if his means improved, and if this Judgment did not satisfy the Plaintiff he should have appealed.

I consider that the course that has been taken of instituting this action in the High Court comes perilously near to an abuse of the forms and procedure of the Courts, and I dismiss the action and order the Plaintiff to pay the Defendant thirty rupees as costs.

In view of the fact that Pleaders are only permitted to appear in native civil cases by permission of the Court it is especially incumbent upon them when consulted by a native that they should take great pains to satisfy themselves that their advice will not lead their clients into unnecessary expenditure.

(*Action dismissed.*)

Cf. Nasoro bin Mohamed *v.* Salim bin Hamis p. 77.

APPELLATE CIVIL.

Before JUDGE HAMILTON.

RASHID BIN MWIJABU
RASHID BIN NAAMAN } *v.* ABDUL REHMAN BIN MOHAMED. C.A. $\frac{2}{1905}$

Reference to Arbitration—Native Case--Formalities of Civil Procedure Code not complied with.

Held—In a native case which has been referred to arbitration, both parties agreeing to abide by the award, an Appellate Court will not interfere to set aside award without good grounds shown, although the formalities of the Code have not been complied with.

The action was originally brought in the Court of the Town Magistrate sitting as native judge to decide the ownership of a plot of ground in the island of Mombasa. Both the parties were natives and the matter was by consent referred to the arbitration of the Kathi, and the Town Magistrate gave judgment in accordance with his award given orally in Court.

The Appellants appealed on the following grounds :—

1. No regular order of reference was drawn up.

2. No time was fixed within which the award should be given.

3. The award was not put in writing nor was it filed in accordance with the Code.

R. M. BYRON *for Appellants.*

Respondent in person.

JUDGE HAMILTON.—(I point out that both parties agreed to Sheikh Mohamed bin Kassim's decision being final, they do not suggest that the Sheikh or Mr. Vincent have acted improperly, and the record itself would show that the procedure adopted has been reasonable and fair to the parties, in accordance with Sheriah, and accepted by them.)

RASHID BIN MWIJABU, RASHID BIN NAAMAN *v.* ABDUL REHMAN BIN MOHAMED. C.A. 2/1905.

This is simply an attempt to get the case retried on appeal after a final settlement has been agreed to.

I should in all cases be loath to interfere to re-open an arbitration of this nature unless on very good grounds shown.

The application of the Civil Procedure Code is not strict in the case of natives, and where no injustice has been shown in fact by the procedure followed, it is not the part of this Court to interfere to insist on a strict adherence to the technicalities of that Code.

(*Appeal dismissed.*)

CRIMINAL REVISION.

Before JUDGE HAMILTON.

REX *v.* MONTEIRO AND DANTOS. Cr.R. 4/1905

Criminal Procedure Code (Act V. of 1898)—Summary Trial, sec. 260, necessary formalities—Jurisdiction.

Held—A Magistrate has no jurisdiction to alter the nature of the offence charged so as to bring it within his powers of summary trial.

The two accused were charged before the Town Magistrate Nairobi with an offence under Section 225 of the Indian Penal Code. The Magistrate tried them summarily and convicted them under Section 225 B.

The Court being applied to for revision of the case, the following order was passed :—

This case has been brought to the notice of this Court by the application of Mr. Burn on behalf of the two accused. The record

shows two irregularities of procedure, either of which is sufficient to warrant the intervention of this Court.

In the first place, the offence complained of, as set out in the necessary headings in the record of a summary trial, though no formal complaint appears on the file, is an offence under "Section 225 I.P.C. Resisting lawful apprehension of another."

It is true that the circumstances of the alleged offence led the Magistrate to convict only of an offence under Section 225 B, which is triable summarily, that, however, does not cover the Magistrate's want of jurisdiction to take the case summarily in the first instance. In such a matter the Magistrate has no discretion, and if the offence charged in the complaint does not fall within the limits laid down in Section 260 of the Criminal Procedure Code the Magistrate has no power to deal with the case summarily, but is bound to follow the ordinary procedure.

In the second place, the pleas and the examination of the accused are not recorded. An omission which may be due to a defect in the printed sheet used, but which is vital to the completeness of the record.

The plea should always be recorded as nearly as possible in the words of the accused.

The law only requires a minimum of record by a Magistrate in cases tried summarily, but care must be taken to see that the minimum requirement is strictly complied with.

For the above reasons the Magistrate's conviction dated 25th May, 1905, must be quashed and the case be retried according to the ordinary procedure. Meanwhile the two accused may be admitted to bail with one surety each of Rs.50, and themselves in Rs.50 each.

(*Retrial ordered.*)

APPELLATE CIVIL.

Before JUDGE HAMILTON.

ABDULRAHIM *v.* HATIJA. C.A. $\frac{10}{1905}$

Practice—Native Courts Regulations, 1897—Appeal from order refusing leave to appeal—Sheriah—Document declaring indebtedness —interest.

***Held*—Where leave to appeal can be granted by the Court giving the decree, and by the Appellate Court, and application is made to the lower Court and refused, the proper procedure is to lodge an appeal against the order of the lower Court refusing leave. Though a stipulation to pay interest is not enforceable under the local Mahomedan law, no such stipulation is to be read into the customary form of document, by which a person having received a certain sum undertakes to repay a larger sum at a future date.**

Hatija mortgaged her house to Abdulrahim for Rs.66. 8., and the following is the translation of the formal document embodying the transaction which was drawn up and duly registered in the presence of the parties.

"Hadijah, freed slave of Talsam bin Mohamed, declares that she is indebted to Abdulrahim bin Hassan Elsindi in the sum of sixty-six rupees, and eight annas cash, which she promises to pay in six months from to-day's date, that is by paying in monthly instalments of eleven rupees to him towards the settlement of the above claim; and that in consideration of the above debt she has mortgaged to him, her house built of timber and clay upon the land of the Liwali Salim bin Khalfan, and the house number being 63, bounded by the lands of the Liwali Salim bin Khalfan on all sides. A mortgage given in security for the above debt, and until the above debt is paid. And that the mortgagee has left the above mortgaged property in the hands of the mortgagor for her use and benefit. A declaration made by the mortgagor to the mortgagee on this behalf; and the above house is situate at the new quarters, Mombasa. Written by Tahir bin Abu Bokari by order of Sheikh Suleman bin Ali. Dated 27, Rabi II, 1322,=12 July, 1904.

(Signed) SALIM BIN TALSAM.

(Signed) ABDULRAHIM BIN HASSAN."

A portion of the loan was paid off but for the balance Rs.34. 8. Abdulrahim sued Hatija in the court of the Town Magistrate, Mombasa, who found that in fact the Defendant received Rs.40 only, and that consequently the balance was to be regarded as interest and any stipulation for interest being null and void, gave judgment for the Plaintiff, for Rs.8 only, *i.e.*, the original Rs.40 less Rs.32 paid on account.

Abdulrahim asked for leave to appeal, which being refused, he applied *ex parte* to the High Court to reverse the Magistrate's order. This application was refused in form, but leave to appeal with notice given.

The following order on the application and judgment in appeal were given.

Mr. J. H. PARKINSON *for Appellant.*

Respondent in person.

Order.—This is an application made *ex parte* by the Plaintiff in Civil Suit, No. 82 of 1905, of the Town Magistrate's Court, Mombasa, to reverse an order of that Court refusing leave to the Plaintiff to appeal against the Town Magistrate's judgment.

Both parties to the original suit are natives and the amount in dispute amounts to Rs.34. 8. only. The Town Magistrate, Mombasa, combines the jurisdiction both of a Collector and Sub-Commissioner, under the Native Courts Regulations 1897, and an appeal lies from his decisions to the Chief Native Court, that is to say, to the High Court, which, under the provisions of Article 28 of the Order-in-Council, 1902, continues the procedure in force prior to that Order where other provision is not made.

Article 51 of the Native Courts Regulations provides that an appeal shall not lie from a Provincial (or Sub-Commissioner's Court) to the Chief Native Court where the subject of the suit is less than Rs.500 in value except with the leave of the Provincial or Chief Native Court.

In this case an application for leave to appeal was made to the Provincial Court and refused, and the application before me now is to reverse this order of appeal and to grant leave to appeal.

After consideration I am of opinion that notice should have been given to the other side of the application and the better procedure would have been to appeal formally against the order refusing leave to appeal.

ABDULRAHIM v. HATIJA. C.A. 10/1905.

I therefore direct the application to be returned to the Appellant to amend and enter as an appeal of which the other side will receive the customary notice.

The Appellant will not be liable for further costs of Court in amending the application as directed except in so far as the costs of entering the appeal may exceed those of filing the application.

The costs of the application will be borne by the applicant in any event.

(*Leave to appeal granted.*)

Judgment.—In this case there appears to be no doubt that the learned Town Magistrate has erred in disallowing a stipulation for interest which is nowhere mentioned. It is an instance of an ordinary native transaction in which an acknowledgment is given in the document of a larger sum than that lent, this being the profit of the lender.

The Respondent admits this.

This being the case the appeal must be allowed and judgment entered for the Plaintiff for the full sum claimed Rs.34.8 with Court Costs in this Court and the Court below.

(Appeal allowed.)

APPELLATE CIVIL.

Before JUDGE HAMILTON.

BISHANDASS *v.* RINGER. C.A. 11/1905.

Civil Procedure Code—Set-off improperly allowed—Not objected to at hearing cannot be raised on appeal—Irregularity not affecting merits—Civil Procedure Code, Section 578.

Held—A set-off wrongly allowed does not necessarily deprive the Court of Jurisdiction, and cannot be raised in appeal.

The original action was tried by the Town Magistrate Nairobi, and the facts appear sufficiently in the judgment.

C. M. DALAL *for Appellant.*

Mr. R. M. BYRON *for Respondent.*

JUDGE HAMILTON.—This is an appeal from a judgment of the Town Magistrate Nairobi.

The facts on which the original action was founded are shortly as follows :—

A Mr. Twyford owed Plaintiff, Bishendas, Rs.65 from whom Major Ringer, Defendant, claimed Rs.75 the value of certain property of his said to have been lost owing to the negligence of Plaintiff's servant while it was under his control.

The Defendant hearing of Twyford's debt to Plaintiff asked him to make out the cheque for Rs.65 in his, Defendant's favour. This Twyford did, and thereupon Plaintiff not knowing in whose favour the cheque was drawn sued Defendant for the delivery up of the cheque.

Defendant offered the cheque to Plaintiff, who, seeing in whose favour it was drawn, refused it, Defendant meanwhile entered a cross-claim for Rs.75 from the Plaintiff. This cross-claim the learned Town Magistrate allowed to be treated as a set-off to Plaintiff's action, and found in Defendant's favour for Rs.10 with the costs of the suit.

The main ground which has been urged on behalf of the Plaintiff-Appellant before me is that, as a set-off should not have been allowed in the Lower Court, judgment should have been entered in favour of the Plaintiff.

Mr. Donald in his judgment makes the following remark :—

" As no objection was raised by the Pleader for the Plaintiff on " the set-off which on no account should have been allowed, I have " now only to consider the fact whether the Plaintiff is responsible " for the loss."

Mr. Dalal has argued that as a client is not bound by an admission of his pleader he should not suffer through his failing to make an objection to the procedure followed. This, however, is not a case in which the Plaintiff's pleader made any admission of fact contrary to his client's interest. He merely acquiesced in an irregular course of procedure, and the question I have to decide is whether the procedure adopted in the Lower Court was such as to

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take the action outside the scope of Section 578 of the Code of Civil Procedure. This section provides that "no decree shall be reversed "or substantially varied . . . . in appeal on account of any . . . . "irregularity whether in the decision or in any order passed in the "suit or otherwise, not affecting the merits of the case or the juris-"diction of the Court."

The action of the Defendant was eventually tried on its merits, and the authorities on the subject and particularly the judgment of the Privy Council in Nan Karay Phaw *v.* Ko Htaw Ah (reported I.L.R. Cal. XIII., 124) would show that a set-off wrongly allowed does not itself deprive the Court of jurisdiction and cannot be raised in appeal.

For these reasons I am of opinion that the case is covered by Section 578 of the Code, and I dismiss the appeal with costs.

(*Appeal dismissed.*)

APELLATE CIVIL.

Before JUDGE HAMILTON.

MUNSHI DEVI DYAL *v.* SOCIETA COLONIALE ITALIANA. C.A. 18/1905

Civil procedure Code Section 43—frame of suit joining all causes of action.

Held.—An action having been brought for damages for breach of contract; a separate subsequent action cannot be brought for money due under the same contract.

The Respondent Company having sued Devi Dyal for damages for breach of contract in the District Court at Kericho, thereafter sued him in the Town Magistrate's Court at Kisumu for money due under the same contract.

The case was given against them in the Kisumu Court, and against this decree they appealed on the ground amongst others that the second suit was barred by the original action.

C. M. DALAL *for Appellants.*

Mr. J. H. PARKINSON *for Respondents.*

JUDGE HAMILTON.—The procedure that has taken place with regard to the original cause of action shows that the Respondents brought two actions against the Defendant, one No. 52/04 in the Kericho Court for damages for breach of contract, and another 86/05 Town Magistrate's Court, Kisumu, for money due under the same contract.

The cause of action in this latter suit existed at the time of the former suit. The present appeal is from the judgment of the Magistrate at Kisumu in the latter action, and Mr. Dalal for the Appellant has raised the preliminary point that that action was under Section 43 of the Civil Procedure Code barred by the former one. This appears undoubtedly to be the case, and on this ground I allow the appeal and order judgment to be entered in the lower Court for the Defendant.

The Respondents must pay the costs of the appeal.

(*Appeal allowed.*)

APPELLATE CIVIL.

Before JUDGE HAMILTON.

RAJAN NANJI (Appellant) O.C. 20/1905

v.

JADOWJI DEWJI (Respondent).

Landlord and Tenant—Notice to quit or pay increased rent—Refusal by Tenant—Tenancy not determined—Oaths Act X. of 1873—Party offering oath to witness.

Held.—A notice in the following terms given by the landlord "if you do not vacate my premises by a certain date you must pay increased rent" is not a notice terminating the tenancy.

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The fact that the tenant remained on without agreeing to the terms does not imply his consent to them.

Evidence of a witness refusing to take an oath offered by party not vital but diminishes the value of his evidence.

Jadowji Dewji gave Rajan Nanji notice to vacate his premises by a certain date or to pay Rs.50 a month rent instead of Rs.20. Rajan Nanji remained on and offered to pay the rent at the old rate of Rs.20. Jadowji then sued him for two months' rent at Rs.50, and Rajan pleaded a yearly tenancy at Rs.20. The case was heard by the Town Magistrate, Mombaṣa, who found in favour of the Plaintiff for rent at Rs.50. Against this judgment Rajan appealed.

C. M. DALAL *for Appellant.*

Mr. R. M. BYRON *for Respondent.*

JUDGE HAMILTON.—This is an appeal from the judgment of the Town Magistrate of Mombasa. The original action was brought by one Jadowjee Dewjee against Rajan Nanji for rent of certain premises in Commercial Street in Mombasa at Rs.50 per month on which he obtained a decree for two months' rent, namely Rs.100, that is for the months of July and August. Against this judgment Defendant has appealed.

The circumstances which gave rise to the case are shortly as follows :—

For a matter of some eight years the Defendant was a tenant of one Noorbhai Jafferji, for the greater part of the time as a monthly tenant, though for a year and a half out of the above period of eight years he seems to have enjoyed a certain tenancy.

On the 30th May, 1905, Noorbhai Jafferji wrote to the Defendant informing him that for the future he was to regard Jadowjee Dewjee as his landlord and make arrangements as to rent with him.

On the 2nd June, 1905, Jadowjee Dewjee also wrote to the Defendant in the following terms :—

" You are to make arrangements with us about rent within eight " days from the date of the receipt of this notice, or you are to inform " us about vacating and take our signature within one month from " the date of receipt of this notice if you will fail in doing so we " will consider that you have agreed Rs.50 per month for rent of the " said house from the date of receipt of this notice and Rs.50 will be

" recovered from you every month from the date of receipt of this " notice."

To this letter the Defendant apparently replied by another letter, to which he himself refers, but which has not been produced in the case, and again at a later date he wrote a subsequent letter (Ex. E) dated 9th August in which he alleged that his former landlord Noorbhai Jafferji had, shortly before he transferred his interest to Jadowjee Dewjee, let the premises to him (the Defendant) for the term of one year certain at Rs.20 per month.

When the case came on for hearing the learned Town Magistrate properly put the burden of proving the allegations on the Defendant, and after hearing the evidence adduced on both sides came to the conclusion that no such agreement as that alleged by the Defendant was in fact entered into by him with Noorbhai Jafferji. In arriving at this conclusion the Town Magistrate was principally influenced by the evidence of Abdulhussein Karimji who appeared as an independent witness in the case. The Plaintiff and his brother, who has an identical interest with him in this case as being the lessee of the adjoining house under the same conditions, both declared that a tenancy had been agreed upon for a year certain, on the other hand this was denied by the Plaintiff and by Noorbhai Jafferji. It is true that when the Defendant offered to be bound if Noorbhai Jafferji would take an oath in solemn form, Noorbhai Jafferji refused to do so and thereby materially discounted the value of his evidence. On the other hand, it is to be remembered that he himself is not a party to the case and was under no obligation to take the oath proposed to him by the Defendant, and in view of the evidence given by Abdulhussein Karimji, which was to the effect that rent was agreed in his presence at Rs.20 a month, but that no fixed period was agreed on for the tenancy. I think that the learned Town Magistrate formed a correct conclusion in finding that the Defendant had not succeeded in discharging the burden that lay upon him of proving the existence of the alleged agreement. This being so, I have now to consider the nature of the notice given to Defendant by the Plaintiff to which I have already alluded. Mr. Dalal has argued that this notice cannot be considered as a definite notice to quit, and in support of his arguments has referred to the case of Bradley *v.* Atkinson 7, Allahabad 596.

In that case the bearing of a notice couched in very similar terms was thoroughly discussed before the full Court. The notice was worded as follows:—

" If the rooms you occupy in the house, No. 5, Thornhill Road, " are not vacated within a month from this date, I will file a suit

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" against you for ejectment as well as for recovery of rent due at the " enhanced rate."

In this case the material words of the notice are " you are to " inform us about vacating and take our signature within a month " from the date of receipt of this notice, if you will fail in doing so " we will consider that you have agreed Rs.50 per month for the " rent of the said house." That is to say, that in both cases the notice to the lessee says, " if you do not vacate the premises by a " certain date you must pay increased rent."

Petheram, C.J., in the course of his judgment used the following argument:—

" Was this an intimation of an intention to terminate the " tenancy on the 31st December, 1882? I am clearly of opinion " that it was not. It is an intimation on the part of the lessor that " if the rent should not be paid within a month's time from that " date he would bring a suit against the lessee. He merely tells " the lessee to vacate the rooms or to pay the penalty. This is not " a notice that terminated the tenancy, and therefore the tenancy " was not determined."

This same argument applies exactly to the present case, the Plaintiff in which tells the lessee to vacate the house or pay the penalty; and having regard to the judgment of the Allahabad Court, I am of opinion in the present case that the monthly tenancy at Rs.20 was not terminated by the notice.

Mr. Byron has argued that the lessee by remaining on and not vacating the premises thereby gave his implied consent to the increase of the rent from Rs.20 to Rs.50. It is clear that there was no active consent given, and as I am of opinion that the old tenancy still continued the conditions attaching to that tenancy must be held to have remained in force, and it cannot therefore be argued that there was an implied consent for the payment of the increased rent.

For these reasons I am of opinion that the Plaintiff was only entitled to recover from the Defendant the rent for the two months in question at Rs.20 per month, and I therefore order the decreed amount to be reduced from Rs.100 to Rs.40; to this extent the Appeal will be allowed and the Respondent must pay the Appellant's costs in this Court. The order as to costs in the Court below will remain.

(*Decree varied.*)

APPELLATE CIVIL.

Before JUDGE HAMILTON.

JUMA BIN MWENYEZAGU *v.* MWENYE BIN ABDULLA. C.A. $\frac{21}{1905}$.

Sheriah—Inheritance—Declaration of paternity by father.

Held.—A son is entitled to inherit the estate of his deceased father on the ground of the acknowledgment of paternity only by the deceased—Proof of the marriage of the son's mother with the deceased is not necessary.

In the original action before the Town Magistrate, Mombasa, it was held that the deceased Abdulla bin Hija had complied with all necessary conditions in acknowledging Mwenye bin Abdulla to be his son, and that Mwenye was entitled to inherit accordingly. Against this finding the Appellant the husband of the descendant of a collateral appealed mainly on the ground that there was no proof of the marriage of Mwenye's mother with deceased.

Parties in Person.

JUDGE HAMILTON.—This is an appeal from a Judgment of the Town Magistrate, Mombasa, with whom the Kathi, Sheikh Mahomed bin Kassim, sat as an assessor.

The original action arose out of an application by Juma bin Mwenyezagu, nephew of Abdulla bin Hijah, of Changamwe, deceased, to be appointed wasi of his late uncle's estate. A caveat was entered by one Mwenye bin Abdulla who claimed the right of appointment as son of the deceased, to which the original applicant replied that Mwenye was an illegitimate son and therefore not entitled to inherit.

Evidence was taken on the relationship of the parties and the behaviour of the deceased towards the caveator, and the learned Town Magistrate found as a fact that the deceased had acknowledged the caveator as his son during his lifetime and that his acknowledgment fulfilled the conditions required by the Sheriah

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for such acknowledgments and that Mwenye was consequently entitled to be regarded as the lawful son of the deceased.

Against this Judgment Juma has appealed on the ground that it was against the weight of evidence and wrong in law, there being no evidence of the proof of the marriage of Mwenye's mother with the deceased.

I see no reason for interfering with the finding of fact in the Lower Court, and the law as applied is clearly in accordance with the law of acknowledgments as laid down by Macnaghten, and Seyyid Amir Ali, the Shafei commentaries of Min Haj, Anwari, and the Fatawiy El Kubra, and as quoted and applied by the Privy Council in the cases of Muhamed Azmat Ali Khan *v.* Mussumat Lalli Begum L. R. I. A. Vol. IX., and Sadakat Hosein *v.* Mahomed Yusuf, I. L. R. Cal. Vol. X.

Proof of the marriage of the son's mother to the person acknowledging him is not necessary ; and in furtherance of this rule of the Sheriah there also exists the natural corollary, viz. : that such acknowledgment is not regarded alone as sufficient to prove marriage with, nor does it entitle the mother to share in the estate of the person making the acknowledgment.

(*Appeal dismissed.*)

APPENDIX I.

SOME NOTES ON NATIVE LAWS AND CUSTOMS.

The fundamental ideas amongst most of the native tribes in East Africa regarding questions of family relationship are :—

(1.) That individual members of a family form the wealth and strength of the united family ;

(2.) That females cannot inherit and cannot dispose of property ;

(3.) That females are themselves property to be bought and sold in marriage, to be assigned in payment of debt, and to be owned and inherited by their male relations.

In fact, the female members of a man's family are as much a part of his property as his cattle, and often the most important source of his income.

Given this conception of society in the minds of primitive savages, whose crimes are commonly the instinctive crimes of passion, it naturally follows that such offences as murder and rape are regarded by them in a very different light from that in which they present themselves to our eyes. Murder is regarded as a loss of strength caused to the family of the person murdered, which may be compensated by the murderer replacing the murdered man with others. Rape of an unmarried woman is regarded as so much loss caused to her owner in the price procurable for her in the marriage market, which may properly be compensated by damages.

In short, these offences which we consider as offences against the person are regarded equally by the natives as offences against property.

The idea common to civilised nations of a crime such as murder being an offence against society and of such fictions as the "King's Peace" has no place in the native mind.

Thus, a native whose unmarried daughter has been raped considers that justice is incomplete if the perpetrator of the deed, in addition to any other punishment he may be awarded, is not compelled also to refund him damages for the pecuniary loss he himself has suffered.

These instances are referred to more particularly to show how essential to any effort to administer substantial justice to the natives is the possession of some knowledge, not only of their customs, but of their manner of regarding the main features of social life.

The valuable provisions of Article 20 of the Order-in-Council of 1902 are not to be misconstrued into an authority for administering justice to natives in the "rough-and-ready" style, of which some affect to think highly, but which is generally but the sign of a lack of experience or of sympathy and patience, and not infrequently results in what is in reality rough-and-ready injustice.*

Every judicial decision where natives are concerned is a stone in the foundations of Government, and in order to be in a position to give a right decision it is above all things necessary that the judge should get to the real kernel of the matter, though at first sight it may appear to him to be incomprehensible, trivial, or even ridiculous.

Where values are quoted in the following pages it must be remembered that they are liable to fluctuation—according to the wealth of the tribe and the general prosperity depending on the seasons. Rupee currency is gradually taking the place of cattle or goats for the expression of terms of value.

WANYIKA.

This is a generic term for a number of more or less allied tribes inhabiting the Nyika country between the coast and the Taru Desert, and includes the :—

Wagiriama,
Wadigo,
Waduruma,
Wa Rabai,
Wa Ribe,
Wa Kambe,
Wa Jibana,
Wa Chonyi,
Wa Segeju (of separate origin, but intermarried).

Their customs are in the main similar but with one or two slight differences, which will be pointed out.

Punishment for murder.

The penalty for murder is that from two to ten persons of the murderer's family be taken and given to the family of the murdered person. In default of this the murderer himself must be handed over to be put to death.

The persons so handed over appear to occupy a somewhat menial position, but being essentially "strengtheners of the family" are not

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* Article 20, O.-in-C., 1902. "In all cases civil and criminal to which natives are "parties every Court (*a*) shall be guided by native law so far as it is applicable and is "not repugnant to justice and morality or inconsistent with any O.-in-C. or "Ordinance; and (*b*) shall decide all such cases according to substantial justice "without undue regard to technicalities of procedure and without undue delay."

regarded as slaves. This is certainly the case with the Wadigo, and probably with most other Nyika tribes. Boys handed over in the above manner among the Wadigo are on coming of age permitted to return home, but not so girls.

The Wadigo draw a distinction between a murder committed in the heat of passion and in cold blood, the number of persons demanded in the latter case being four times that in the former. In later years blood money has been reckoned at 100 joras of americani.

Other offences are punished by fines.

Marriage. There is no limit to the number of wives a man may have, they are obtained by payment of a sum agreed with the woman's father or guardian. The contract is generally made when the girl is about eight years old.

Divorce. The marriage price is security for the woman's good behaviour, and a divorce can always be arranged on terms of its repayment; and in the event of the death of the woman's father or guardian, it is recoverable from their respective heirs.

Inheritance. The eldest surviving brother of a deceased man is his sole heir, but he is burdened with the duty of providing a home for the deceased's widows and children. It is from the prices paid on the marriage of the daughters and re-marriage of the widows that their guardian benefits out of the inheritance.

Where there are no surviving brothers, the eldest son inherits, then the other sons in turn, then nephews and grandsons in turn, but all under the obligation of providing for the deceased's widows and children. If the children are young a cousin takes. If the eldest surviving brother of the deceased be younger than the sons, he inherits the wives, and daughters only, other property being equally divided between the sons.

Amongst the Wa Rabai, if the eldest son be married, he inherits as sole heir and can make what arrangements he likes on behalf of his brothers.

In practice it frequently happens that the deceased's surviving brothers divide his widows and unmarried daughters between them.

In the event of there being no person so entitled by custom capable of inheriting, the widows and unmarried daughters are taken charge of by the nearest male relative of their respective mothers.

Ascendants never inherit, and females only in the case where there is no male collateral or descendant.

Variation of custom of inheritance among the Wadigo. The Wadigo differ from all other Nyika tribes in this respect, that inheritance is traced in the first place through the deceased's sisters, and not his brothers. The heirs are the children of the deceased's sisters, which in practice resolves itself into the strongest nephew.*

In the case of an Mduruma or Mdigo who has become a convert to Islam, or "Haji," his children go on his death to the eldest brother of their respective mothers.

Where there are no nephews by a sister, the inheritance goes to the family of deceased's mother, and failing them, first to sons, and then to grandsons of his maternal aunts.

Guardianship of children among Wadigo.

A Mdigo father in like manner has no right of disposing of his own daughters in marriage, who are disposed of by his mother's brother.

Land.

All land is considered to belong to God, and cannot therefore be bought and sold, but trees and crops may be. An occupier's right depends on his cultivation of the land.

Predial larceny.

In the case of robbing from a plantation by night, the owner is justified, if he cannot recognise the thief, in shooting at and killing him, but not if he is able to identify him.

Wagiriama.

Wagiriama—the most important Nyika tribe.

Habitat.

Coast strip from Rabai N. to the Tana River.

Punishments for murder.

In the event of murder, the murderer is bound to pay to the family of the deceased, two persons (generally children) to take the murdered man's place.

Should a man murder his own brother or father, the penalty is to pay one person only.

Should a man murder his own wife or child there is no penalty, as the murderer has in this case committed an offence against himself only, and destroyed his own property.

Marriage.

A marriage contract is made between the intending husband and the girl's father, and requires in theory the girl's consent; though this consent may be necessary if the girl is of full age, it would not appear to be so in cases where the girl is betrothed when still a child, as there is no provision for her repudiating the contract on arrival at maturity.

Mahunda.

The price fixed for the bride is known as "mahunda," and is paid by the bridegroom's father, as no Mgiriama is capable of holding property till after his marriage.

The price varies according to the wealth of the parties.

This "mahunda" remains as a debt to be repaid the bridegroom's father, and is liquidated by the married couple either returning to his village and working for him or by their giving him a daughter.

When a marriage contract is made for a girl before she attains puberty, she remains with her parents till she attains puberty.

This does not appear, however, to be always the rule, for in many instances the child passes to the bridegroom's parents and is kept by them till she becomes marriageable.

Divorce.

When divorce is granted on account of the misconduct of the woman she is returned to her father's house, but the father-in-law, or should he be dead, his heirs, must in that case refund the "mahunda."

Should a woman leave her husband and not return to her father's house but go elsewhere, the man with whom she goes to live is liable to pay the amount of the mahunda as compensation to the first husband.

Wives are inherited by the deceased's brothers, and failing them by his nearest collateral male relatives. Inheritance.

Other property is inherited by the eldest son with an implied trust for the benefit of his brothers equally. Where, however, a particular shamba has been worked by one of deceased's wives, it is inherited by her own sons to the exclusion of step-sons.

A woman cannot inherit property.

Custom permitted of debts being paid with infant females.* Debts.

The binding form of oath is to swear by the hyena.† Oath.

GALLA.

N. of the Tama River, behind the Lamu Archipelago. Habitat.

As the *lex talionis* obtains amongst this tribe in a primitive form, blood can only be wiped out by blood. This not infrequently leads to lengthy vendettas which descend from father to son, and one murder leads to many deaths. Manslaughter not amounting to murder may be forgiven. Punishments for murder.

In cases of rape or adultery the offender may be publicly thrashed by the offended father or husband. For rape and adultery.

The penalty for theft is by the thief being ordered to make restitution of a property of a greater value than the article stolen; minor offences are punished with fines; and there is also a punishment of public cursing or excommunication which is resorted to in some cases to bring a backslider to reason. For theft and other offences.

Marriage is a matter of arrangement, the price paid for a wife going to her father and the marriage tie is considered indissoluble. Marriage.

On a man's death his wives are inherited by the brother of deceased, and failing brothers by his next of kin. Other property goes to the eldest son. Inheritance.

The Gallas hold slaves, and though a slave cannot own property he may be freed and adopted as a son by his master. Slavery.

The form of oath considered binding by a Galla is by a spear. Oath.

WABONI.

These people are also known as Wasanya and Wat. They are a hunting tribe, living between the coast strip and the desert from the Galla country in the North to the Kilifi Creek in the South. Habitat.

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* This is a custom to which the Courts would not give effect as being essentially opposed to morality.

† *Cf.* note p. 111.

Punishment for murder. In the case of murder the murderer is handed over to the family of the murdered person to be dealt with.

Should the death have been caused by accident, the person who caused it is bound to produce another person to fill the place of the dead man.

Marriage. Is arranged by purchase.

Inheritance. The property of the deceased goes in the first place to his children, and failing them to his brothers.

Form of oath. The Waboni swear by stepping over the tail of a wild animal or a spear, with the invocation, "May this animal," or this spear, "kill me if do I not tell the truth." *

WATEITA.

Habitat. Teita hills, near Voi.

Punishment for murder. Murder is punished among the Wateita on much the same principle as obtains among the surrounding tribes, but a difference in degree is recognised according to the manner in which the death was caused. The place of the man murdered must be filled by another, or compensation paid in cattle; in default of either of these methods of compensation the murderer is handed over or put to death. If the death has been caused by beating with a club the compensation is reckoned at ten goats and a bullock; if by wounding with a knife, sword, or arrow, at one girl, 100 goats and 100 head of cattle; if by poison administered internally the murderer is compelled to take the same poison.

Punishments for other offences. In the case of accidental homicide the compensation payable is one child, or two head of cattle and five goats.

Other offences are punished by fines of which one-half go to the elders, and one-half to the party injured, *e.g.* :—

Assault: fine	...	...	one bullock.
Rape	,, ...	...	two bullocks.
Adultery	,, ...	...	four goats.

A thief is bound to make restitution of the stolen article, and also to give a present to the elders.

Marriage. Marriage is arranged by a purchase, but in the case of a man dying and leaving widows, a somewhat unusual custom is observed.

The widows are not at liberty to leave the deseased's village, but are allowed to marry anyone they please. A man who marries a widow is bound to support her family, and in the event of her death he goes away leaving in the family any offspring that he may have had by her.

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* *Cf.* Note p. 111.

Widows have also the further privilege of being allowed to inherit a share in any of the miscellaneous property other than live stock of which their husbands may have died possessed. Inheritance

Live stock and daughters are divided equally between the sons, and should the numbers not be such as to permit of an equal division the share of the youngest son suffers.

An occupation right to land is recognised, but should a man leave the land formerly occupied by him uncultivated for a season this right lapses. Land.

WATAVETA.

These people, who live on the eastern slopes of Kilimanjaro, show certain marked differences in their customs from those of other Bantu East African tribes, owing to the Masai influence. Habitat.

The tribe is divided into degrees of rank, each degree being composed of members of a like age. Degrees of rank.

A custom in the nature of polyandry prevails, and it is usual for a man to lend his wives to his comrades of the same age-rank as himself. Polyandry.

Should a man, however, commit adultery with another man's wife without his consent, he is punished by fine and compensation, the amount varying in an increasing or diminishing degree according as the adulterer is above or below the age-rank of the husband. Adultery.

The *lex talionis* is the old law of punishment for an offence against the person, but the due penalty may be compounded by payment of compensation in cattle. Lex talionis.

Murder may be compensated by payment of thirty goats, six oxen, or three cows, with a fine of one ox, which goes to the elders. Payment of the compensation may be made by instalments and spread over a term of years. Murder.

Should a man cause another to lose a limb or an eye he is bound thereafter to contribute a goat to every public feast.

Theft is punished by the thief being compelled to refund the thing stolen and pay five times its value, or to permit the person robbed to take anything he likes from him. Theft.

Marriage is arranged by purchase, and as naturally follows in a society where polyandry prevails, divorce is not granted for adultery. Marriage

Divorce can, however, always be arranged by the woman getting someone to pay back to her husband the price originally paid for her. The husband can, with the consent of the elders, put away his wife if she refuses to work or causes him trouble by her ill conduct; in which case if Divorce.

she has born no children her relatives must return the price paid for her. If she has born a child only one half of the price is returned, and if she has born two or more nothing remains to be returned.

Inheritance. On death a man's property passes to his sons, the eldest son taking the largest share; his widows go to his eldest surviving brother or should no brother survive him to his eldest surviving paternal cousin, who also acts as guardian of the other property if the sons are too young to look after it.

Should a man die leaving no son or near relation the elders take charge. A woman cannot inherit, but should the deceased leave no sons it is usual to give a small plot of land to his daughters, which on their marriage becomes the property of their husband.

Land tenure. Ownership of forest land is recognised, and the different members of a family each own their separate plot.

Strangers may obtain permission to hold land for which they pay a rent to the owner.

MASAI.

Habitat. A tribe of nomads, the Masai, with their flocks and herds, stretch from Kilimanjaro across the plains and up the Rift Valley to the northern plateaux of the Protectorate. They do not till the soil and their wealth consists in their stock.

Murder. Murder is atoned for by the payment of heavy compensation to the relatives of the murdered man, amounting to as much as 100 herd of cattle; in the case of a boy being murdered the compensation is about half.

Should a moran (warrior) hear a moru (elder) cursing him he may kill the moru but must pay blood money of 12 cows to the murdered elder's relatives.

Assault. Intentional injury resulting in a broken bone is compensated by payment of one heifer. If the lobe of the ear be torn the compensation is one young ewe.

In the event of death or injury being caused unintentionally the elders settle what amount of compensation may be properly paid.

Theft. Theft of cattle, goats, or sheep is punished by the thief making restitution of twice the number of the stock stolen.

This rule applies to each person engaged in the theft.

If a thief on being caught admits the offence the fine is reduced.

Marriage. A warrior on obtaining permission from the elders to marry after 10–15 years' service purchases his bride from her nearest male relative.

Divorce. Divorce is practically unknown, but a wife in fear of her husband may take refuge in the house of a man of her husband's age and rank.

If a woman, however, voluntarily leaves her husband and goes back to her relatives, the marriage payment must be returned to him.

Should a warrior or boy commit adultery with a woman of his father's age-rank, he is liable to be cursed and to pay a fine of two oxen to have the curse removed. Adultery committed by a man with a woman of his own age-rank is no offence. Adultery.

If an unmarried girl has had a child, the man who is in treaty for her in marriage, may call on the father of the child to pay the marriage fee, and may take her to wife and adopt the child. Illegitimacy.

But it is permissible to procure abortion of a child conceived out of wedlock or to club it to death when born.

Incest with a daughter or one of her age-rank is punished by the other elders pulling down the offender's kraal and taking toll of his cattle. Incest.

Theoretically all the property of a deceased elder belongs to his eldest male child. But in practice he divides the greater portion of his cattle among his wives. On his death his wives give these cattle to their respective sons. But the eldest son takes the stock belonging to the childless widows. Should the eldest son be incompetent his brothers may make election of another brother to take his place. Inheritance.

If a man dies childless, his cattle go to his brothers and his widows to his half-brothers on the paternal side.

Should a widow afterwards have a son by a half-brother of the deceased or by another man, this son is given the cattle which he would have inherited had his mother's first husband not died, being regarded as a member of the deceased's family. Widows.

The property of minors is taken care of for them till they grow up. Minors.

A man may not inherit the property of his maternal uncle.

Land is frequently named after the section of the tribe that first used it as a grazing ground, or is for the time being occupying it. But individual rights to land as distinguished from tribal rights to land are not recognized. Land.

If a speaker's veracity is challenged, if a man he swears "By my sister's garment," if a woman, "By my father's garment." * Form of oath.

NOTE.—The Masai form is " 'N-gilani e-'n-gerai o-'l-poror lang " or " 'N-gilani e-'n-gerai ai." This is used by men only. (Hollis).

BANTU KAVIRONDO.

The slopes and valleys, N.E. of Lake Victoria. Habitat.

Marriage is arranged with the parents of the bride, while she is still a young girl, and the suitor pays them the agreed price by a succession of presents. Marriage.

* *Cf.* Note p. 111.

Should the wife die after marriage without bearing a child to her husband, he may claim from her parents one of her younger sisters as wife in her place, or demand the return of the price originally paid for her.

Divorce. This same course of action is open to the husband should he divorce his wife on account of a fault committed by her. On the other hand should the divorce be due to the fault of the husband, and the woman marry again, the price originally paid is returnable.

Son-in-law. Amongst certain Kavirondo tribes (Nyole, Lakoli, Ithako, Ishuka) the son-in-law retains a claim to all the produce of the cows which he paid for his wife, till such time as all the cows originally given have died.

Inheritance. On death a man's property is divided equally between his children, and his widows go to live with their sons. Should there be left a widow with small children and no grown up son she becomes the wife of the eldest son by another wife, or if there be no grown up son, of the brother of the deceased.

A man cannot marry his aunt, she is consequently pensioned off with one cow.

JALUO NILOTIC KAVIRONDO.

Marriage. As with the other branch of the tribe, marriage is arranged by an early betrothal, and the price is paid by continued small payments from time to time. Should these payments cease before the agreed price has been liquidated, the girl returns to her father's house.

If the wife should prove childless, the payments are returned to the husband, or the father-in-law provides him with another wife.

Desertion by wife. Should a wife desert her husband and marry another man, the first husband is entitled to receive from the second the same price as that he originally paid his father-in-law. If there have been children of the union before the desertion of the wife, they remain with their father.

Inheritance. A man's property goes on his death to his children, but if they are small, to the eldest brother.

If the eldest son is grown up he takes all the property in the first instance, but is bound to give a share to each of his brothers. Should he have sisters, the marriage payments for them go to the eldest brother of the deceased who also takes the deceased's wives, with the exception of the youngest, who goes to the eldest son.

Offences against the molesty of a woman. Though the Kavirondo do not wear clothes, a breach of decorum such as touching the ornamental tail worn by the married women, is regarded as a punishable offence.*

Form of Oath. A person challenged may swear to his innocence or his veracity by stepping over a piece of "Murembe" tree placed between him and his

* *Vide* p. 107 Report by Mr. Partington on Crim. Case 274 Town Magistrate's Court, Kisumu. 1904

challenger and saying, "If I am guilty," or, "do not speak the truth, may this tree rise and kill me." If "Murembe" is not procurable a solanum plant known as "Tunguja" in Ki-swahili is used. (Hobley).*

* *Cf.* Note p. 111.

REPORT BY MR. PARTINGTON ON CRIMINAL CASE $\frac{274}{1904}$ TOWN MAGISTRATE, KISUMU.

REX *v.* MANIA AND OTHERS.

Any act, such as touching the "tail" of a married woman, or in the case of an unmarried girl her frontal beads, and, of course, much more her private parts, is considered among the Nilotic Kavirondo an indecent offence. The woman should at once go back to her village and remain in her hut for certain days of purification. It is left largely to her discretion to decide the amount of moral damage she has suffered, and the number of days of purification required. Meanwhile the "Wazee" send for the offender and arrange the matter. Usually a feast paid for by the man ends the matter unless he has assaulted her. Although these customs are still kept up in their own homes, they are not so strict outside as formerly.

In the present case, however, the Nilotic Kavirondo would, I think, undoubtedly regard the Kavirondo girl as having been made unclean.

AKAMBA.

From the Nyika tribes near the coast north-westward to the Kikuyu country— Habitat.

Murder is compensated for by the payment of blood money, and this compensation is payable whether the death was caused intentionally or by accident. Punishment for murder.

Payment for a man is 11 cows, one bull, one goat.

Payment for a woman is four cows, one bull, one goat.
The cows being the compensation payment and the bull and goat the elders' fee. No compensation is payable in the case of a man who is killed while trespassing in a strange boma or shamba by night.

Theft is punished by the thief being ordered to restore the property stolen, and to pay a fine to the elders according to the value of the property. Theft.

The punishment for rape is for the offender to be beaten and to pay a bull as compensation to the woman's husband, or if unmarried her father. Should the offender be killed in *flagrante delicto*, no compensation is payable. Rape

Injury to person.

Assault resulting in injury to person is compensated on the following scale:—

Injury to Man.	Compensation
Simple assault...	1 goat.
Loss of hand or arm	5 cows and 1 bull.
„ leg	Do. do.
„ eye	1 cow.
„ both eyes	11 cows and 1 bull.
„ nose	1 cow and 1 bull.
„ teeth	1 goat for each tooth.
„ finger	1 cow.
„ ear	1 goat.
„ hearing	1 cow.
„ male organs	5 cows.

Injury to Woman.	Compensation.
Loss of hand, arm or leg	1 cow.
„ eye	1 bull.
„ both eyes	2 cows.
„ finger	1 bull.
„ breast	1 cow.
„ both breasts	2 cows.

Compensation for injury done to a woman goes to her husband or father, as the case may be.

Drunkenness, liability of host.

As in English law drunkenness is no excuse for an injury done, but should a guest, while at his host's boma at a drinking bout, either commit an offence himself or be killed or injured by a third party before reaching home, his host is responsible for payment of the resulting compensation.

Liability of employer.

In like manner, should one person employ another on his business and he meet with an accident while so employed, the person who employed him is liable to pay compensation.

In like manner also, the owner of a bull or cow that does injury is liable to pay compensation for the injury done.

Sacred trees, injury to.

Certain trees are considered sacred by the Akamba, and should any one damage one of these trees he is fined one cow and one bull which go to the elders.

Roads and streams.

No one has the right to obstruct a road or water-way, and any interference with a water-trench is punished by the fine of one bull.

Marriage.

Marriage is arranged by purchase and no woman can hold property.

Inheritance.

All family property is vested in the head of the family and on his death everything passes to his eldest son, who assumes the headship of the family, with the obligation of providing the marriage price for his brothers with which to purchase wives.

The purchase price of his sisters is divided amongst the whole brothers of the bride, should she have no whole brothers then amongst her brothers of the half blood.

Should a man get an unmarried woman or the wife of another with child and she die in giving it birth, he has to pay blood money. If, however, before her death he had made an arrangement to pay the marriage price, no blood money is payable. Blood money for death ensuing on childbirth.

The Akamba have no form of oath considered generally binding, but perform certain rites to evidence the honesty of a claim to property.* Form of oath.

If the eldest son at the time of his father's death is a minor, the eldest surviving brother of the deceased acts as guardian.

The widows of the deceased remain in the boma as members of the family.

There is no individual ownership of land, but family rights of occupation are recognized. Land tenure.

AKIKUYU.

From the Ngong Hills along the slopes of the Escarpment in a north-easterly direction to Mount Kenia. Habitat.

A death, whether caused by accident or design, is compensated for by a payment of 100 goats in the case of a man, and 30 goats in the case of a woman. Punishment for murder.

Injury to the person is compensated for by a scale of payments as follows:— Injury to person

Loss of leg or hand...	...	...	50 goats.
Loss of a finger ...	...	...	10 „ for every joint.
A serious spear wound	...	...	30 „
An ordinary sword wound...		...	1 sheep compensation, and 1 sheep to be eaten in common.

If a thief steal goats he must repay 10 for every one stolen.

Theft of honey from a honey barrel is punished with a fine of 10 goats; theft of a sword, one goat; theft of produce from a shamba three sheep. Theft.

Theft of ivory can never be compensated for, and a man's heirs may be called on to pay for stolen ivory without reference to any previous payments that may have been made.

If a man burn down another's hut the compensation payable is 30 goats. Incendiarism.

The punishment for adultery is 10 goats compensation to the injured husband, and a fine to the elders. Adultery.

Should the slayer of another be too poor himself and his family to pay compensation he has to serve the family of the deceased until the debt is paid. Slayer of another too poor to pay compensation or not of age.

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* *Cf.* Note p. 111.

If death be caused by a child and his family be unable to pay, he is on attaining manhood treated in a like manner.

If the death be caused by a girl, the price paid for her on marriage can be claimed by the relatives of the deceased.

Marriage. Marriage is a matter of purchase and sale in which the woman has no say as the contract is usually made when the woman is quite young. The woman remains with her parents till about the age of fourteen when her husband comes and takes her away. The average price paid is 30 goats.

Should a wife desert her husband and go to another man he must pay the husband the price paid by him for the woman in which case he can keep her. Otherwise he sends her back and pays 10 goats to the husband. The feelings of the woman are not consulted, and cases are known where women have hanged themselves rather than live with a man whom they do not like.

Should a woman desert her husband and return to her father the father must repay the husband the marriage price.

Payment of debt with person of woman. In only one matter does it appear that a woman is regarded otherwise than as a chattel. A debtor may satisfy his creditor with the payment of a woman, but this can only be done with the consent of the woman herself.*

Inheritance. On death a man's property is taken charge of by the eldest son if of age, to divide equally between all the sons.

If there be no son or no son of sufficient age to take charge of the property, it passes to the eldest surviving brother.

Whoever takes charge of the property, takes over with it responsibility for payment of the deceased's debts and for the maintenance of his widows.

Court fees. It is the usual custom to pay three goats to the elders for hearing a shauri, the equivalent of our "Court Fee" on taking out a summons.

Oath. The Akikiyu have no recognized form of oath, so far as ascertained.†

Report on Methega *v.* Karoga.

Kamao, brother of the Defendant, who had died just about the time of the famine, had stolen three goats of the Plaintiff. The Plaintiff took no action in the matter till the 23rd February, 1904, when he instituted proceedings against Karoga, brother of Kamao (deceased) for the recovery of these goats in the Court of the Collector at Dagoretti. The case came on for hearing on the 27th February. It having been ascertained that Defendant had succeeded to his deceased brother's property and also got

* Report by Mr. Donald on Civil Case $\frac{137}{1904}$ Collector Dagoretti Methega *v.* Karoga.

† *Cf.* Note p. 111.

possession of his wife and child, judgment was entered in favour of Plaintiff for thirty goats against Defendant in accordance with Kikuyu custom. Njoroga (Chief) gave evidence in the case as to the custom among Kikuyus in such matters. After this the parties effected a compromise out of Court, the Defendant agreeing to make over his deceased brother's daughter, Nbothi by name, to the Plaintiff in full satisfaction of the decree. I do not think there can be any doubt that this compromise was acted upon for the time, and there is nothing to prove that the officials at Dagoretti had any knowledge of it. No complaint was made to them. Apparently the girl was not satisfied for she on four occasions ran away from Plaintiff and went to her mother's place, who was at the time a mistress to one, Kachuhi, living on Dr. Scott's land. Kachuhi is said to have been her lover since her husband's death. The Plaintiff alleges that the girl left him at the instigation of her mother. The issue arises whether Defendant had power to effect this compromise. From the evidence of nine of the important chiefs, and also from Plaintiff's statement, it is evident that the Defendant had no power according to the Kikuyu custom to enter into this arrangement *without the consent of the girl.* It is clear that the girl was not a consenting party. The only person who affirms he was vested with such power is the Defendant himself.

NANDI.

Marriage. As with other tribes marriage is a matter of purchase, and if the wife prove childless the price paid is returnable.

Inheritance. The eldest brother of the deceased inherits all his property including his wives, with the exception of his weapons, which go to the eldest son.

NOTE.—The meaning and object of an oath as generally understood among the native tribes partakes rather of the nature of "trial by ordeal" of an accused person than of a mode of adding solemnity to evidence. The method of trial by an ordeal of poison and by certain forms of "making dawa" or witchcraft are prevalent among most tribes, particularly those of Bantu origin, in addition to or in place of the forms of oath quoted above. It is consequently contrary to native ideas that a person who is a witness only should be made to undergo an ordeal which should, according to their way of thinking, be reserved for the accused. This conception of justice, common to all peoples in a primitive stage of development, that an accused person must clear himself of the charge, and may do so by accepting an ordeal, does not accord with our system, which strives to bring home to the mind of the witness the serious responsibility that lies upon him to speak the truth, inasmuch as the fate of the accused depends directly on his evidence. There would, however, seem to be no reason why the natives should not be further educated to this point of view by the tribal form of oath, where one exists, being adapted to the requirements of our system of trial, which removes responsibility from the accused and places it on the witness. The members of those tribes who do not understand the nature of an oath may be affirmed to speak the truth. (*Vide* Native Oaths Ordinance, 6 of 1906.)

APPENDIX II.

ORDINANCES, RULES OF COURT, &c.

ORDER-IN-COUNCIL.

EASTERN AFRICAN PROTECTORATES (COURT OF APPEAL) ORDER-IN-COUNCIL, 1902.

Buckingham Palace, 11th August, 1902.

At the Court at *Buckingham Palace*, the 11*th* day of *August*, 1902.

PRESENT,

The KING'S Most Excellent Majesty in Council.

Whereas by treaty, grant, usage, sufferance, and other lawful means His Majesty has power and jurisdiction within the territories of Africa known as the East Africa, Uganda, and British Central Africa Protectorates (in this Order referred to as "the said Protectorates"):

And whereas it is expedient that a Court should be established for the hearing and determining appeals from His Majesty's Courts in the said Protectorates:

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as "Eastern African Protectorates (Court of Appeal) Order-in-Council, 1902."

2. A Court shall be constituted, called His Britannic Majesty's Court of Appeal for Eastern Africa (in this Order referred to as "the Court of Appeal), which shall exercise such appellate jurisdiction and such other

powers in relation to the High Courts and other Courts in the said Protectorates as may from time to time be conferred by Ordinances passed under the provisions of the Orders-in-Council relating to the said Protectorates respectively.

3. The members of the Court of Appeal shall be the Judge or Judges for the time being of His Majesty's Court for Zanzibar, and the Judge or Judges for the time being of the High Courts of the said Protectorates respectively, and such other competent person or persons, if any, each being a member of the Bar of England, Scotland, or Ireland, of not less than five years' standing, as the Secretary of State may from time to time appoint.

4. The precedence of the Judges of the Court of Appeal shall be determined according to instructions to be given from time to time by the Secretary of State.

5. For the hearing and determining of appeals, three Judges of the Court of Appeal shall sit together; but provision may be made by Rules of Court for the hearing of any specified classes of cases by less than three Judges.

6. The Court of Appeal may sit at such places in Zanzibar, or in any of the said Protectorates as may be fixed by Rules of Court.

7. The Secretary of State may appoint a Registrar and such other officer of the Court of Appeal as may be necessary.

8.—(1.) The Court of Appeal may make Rules of Court with respect to all matters of procedure relating to the exercise of its jurisdiction.

(2.) Rules of Court when allowed by the Secretary of State shall have effect as if contained in this Order: Provided that in case of urgency declared in the Rules, the same shall take effect before such allowance, and shall continue to have effect unless and until they are modified or altered by the Secretary of State, and are published by the Court of Appeal as so modified or altered.

9.—(1.) When a final judgment or order of the Court of Appeal made in a civil action involves the amount or value of 10,000 rupees or upwards, any party aggrieved thereby may, within such time as may be prescribed by Rules of Court or, if no time is prescribed, within three months after the same is made or given, apply by petition to the Court of Appeal for leave to appeal to His Majesty the King in Council.

(2.) The applicant shall give security to the satisfaction of the Court of Appeal to an amount not exceeding the amount or value of 5,000 rupees for prosecution of the appeal, and for such costs in the event of the dismissal of the appeal for want of prosecution as the Court of Appeal may award,

and for payment of all such costs as may be awarded to any respondent by His Majesty in Council, or by the Lords of the Judicial Committee of His Majesty's Privy Council.

(3.) He shall also pay into the Court of Appeal a sum estimated by that Court to be the amount of the expense of the making up and transmission to England of the transcript of the record.

(4.) If security and payment are so given and made within such time as may be prescribed by Rules of Court, then, and not otherwise, the Court of Appeal shall give leave to appeal, and the Appellant shall be at liberty to prefer and prosecute his appeal to His Majesty in Council according to the Rules for the time being in force respecting appeals to His Majesty in Council from His Colonies, or such other Rules as His Majesty in Council from time to time thinks fit to make concerning appeals from the Court of Appeal.

(5.) In any case the Court of Appeal if it considers it just or expedient to do so, may give leave to appeal on the terms and in the manner aforesaid

10.—(1.) Where leave to appeal to His Majesty in Council is applied for by a person ordered to pay money or do any other act, the Court of Appeal shall direct either that the order appealed from be carried into execution, or that the execution thereof be suspended pending the appeal, as the Court thinks just.

(2.) If the Court of Appeal directs the order to be carried into execution, the person in whose favour it is made shall, before the execution of it, give security to the satisfaction of the Court for performance of such Order as His Majesty in Council may think fit to make.

(3.) If the Court of appeal directs the execution of the Order to be suspended, the party against whom it is given shall, before an order for suspension is made, give security to the satisfaction of the Court for performance of such Order as His Majesty in Council may think fit to make.

11. This Order shall not affect the right of His Majesty at any time, on the humble petition of any person aggrieved by a decision of the Court of Appeal, to admit his appeal on such terms and in such manner as His Majesty in Council may think fit, and to deal with the decision appealed from in such manner as may be just.

And the most Honourable the Marquess of Lansdowne, K.G., one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

A. W. FITZROY.

(*Extract from the* "London Gazette" *of Friday, August* 15*th*, 1902.)

EAST AFRICA PROTECTORATE.

AN ORDINANCE.

Enacted by His Britannic Majesty's Commissioner for the East Africa Protectorate.

C. ELIOT,
His Majesty's Commissioner.

No. 28 OF 1902.

APPEALS.

It is hereby enacted as follows :—

1. This Ordinance may be cited as "The Appeals Ordinance, 1902."

2. In any case in which there would have been a right to appeal from His Majesty's Court for East Africa or from any other court in the Protectorate to His Britannic Majesty's Court for Zanzibar or to any other court in Zanzibar under the East Africa Order-in-Council 1897 or any Order in Council amending the same or under any King's Regulations made under the said Orders, there shall be a right to appeal to His Britannic Majesty's Court of Appeal for Eastern Africa.

3. Pending the issue of rules of court, the practice and procedure on appeals to the said Court of Appeal from any Court in the Protectorate shall be the same, so far as practicable, as the practice and procedure heretofore in use upon appeals to His Britannic Majesty's Court for Zanzibar or to any other court in Zanzibar.

C. ELIOT,

MOMBASA, November 13th, 1902. *His Majesty's Commissioner.*

RULES OF COURT.

Issued by H. B. M.'s Court of Appeal for Eastern Africa, with the sanction of the Secretary of State, under the provisions of "The Eastern African Protectorates (Court of Appeal) Order-in-Council, 1902."

Entry of Appeal.

1. For the purpose of every appeal to the Court of Appeal, the Appellant shall file with the Registrar or other officer of the High Court of the Protectorate from which the Appeal emanates (hereinafter called the High Court), a Memorandum in writing setting forth concisely and under distinct heads, the grounds of objection to the decree appealed against without any argument or narrative; and such grounds shall be numbered consecutively.

2. The Appellant may appeal against the whole or any part of a decree, and the Memorandum of Appeal shall state whether the whole or part only of such decree is complained of, and in the latter case shall specify such part. The Memorandum of Appeal shall also state the nature of the relief which is sought.

For the purpose of these Rules, a decree shall include a judgment order or sentence.

Appellant confined to the grounds set out, &c.

3. The Appellant shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of objection not mentioned in the Memorandum, but the Court in deciding the appeal shall not be confined to the grounds set forth by the Appellant:

Provided that the Court shall not rest its decision on any ground not set forth by the Appellant, unless the Respondent has had sufficient opportunity of contesting the case on that ground.

In these Rules the term Respondent shall include any person to whom notice of appeal has been given.

Time for filing Memorandum of Appeal.

4. The Memorandum of Appeal shall be filed in civil cases within three months, and in criminal cases within ten days from the date of the decree appealed against. Provided that in criminal cases, if the Appellant is in gaol, he may present his Memorandum of Appeal to the officer in charge of the gaol, within such ten days, who shall thereupon file such Memorandum in the High Court.

Leave to file out of time necessary.

5. If a Memorandum of Appeal is filed out of time, the High Court shall require the Appellant to file a petition for leave to file the Memorandum of Appeal out of time, supported by an affidavit giving reasons for the delay, and the High Court, on forwarding the application to the Court of Appeal, may make such remarks as it thinks fit in regard to the statements contained in the affidavit, and until such petition shall have been granted, and a notification thereof forwarded to the said High Court, all proceedings in the appeal shall be stayed.

Fees payable, and security, &c.

6. On filing the Memorandum of Appeal, the Appellant shall pay to the High Court such fees as may be payable locally. The Appellant shall also, within such time as the High Court directs, give reasonable security to the satisfaction of the said Court for the prosecution of the appeal and for payment of the fees of the Court of Appeal, and of any costs that

may be ordered by the Court of Appeal to be paid by the Appellant, and shall pay such sum as the High Court thinks reasonable to defray the expense of the making up and transmission of the record to the Court of Appeal.

Declarations, &c., may be filed with Memorandum.

7. The Appellant may, with his Memorandum of Appeal, file a declaration in writing that he does not wish to be present in person or by pleader on the hearing of the appeal, together with such arguments as he desires to submit to the Court of Appeal.

Service of Notice.

8. The High Court shall give notice of the appeal by serving a duplicate copy of the Memorandum of Appeal, and also of the declaration and arguments (if any) mentioned in Rule 8.

Persons to be served with Notice.

9. Such notice shall be given to all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice to be given to any person and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been parties directly affected by the appeal, and originally served with notice.

10. The Respondent may, within seven days after receiving such notice, file a declaration, in writing, that he does not wish to be present in person or by pleader on the hearing of the appeal, together with such arguments as he desires to submit to the Court of Appeal.

11. The High Court shall have full power to allow amendment of the Memorandum of Appeal, declarations, and arguments, upon such terms as to service of notice of such amendment, costs and otherwise, as it may think fit.

High Court to make up Record.

12. The High Court shall, with all convenient speed after the expiration of seven days from the date of service of notice on the Respondent, and without the application of either party, make up the Record of Appeal which shall consist of the Memorandum of Appeal, declaration and arguments (if any), and copies of all material proceedings including a copy of the evidence and decree and forward the same to the Registrar of the Court of Appeal. Provided that the High Court may forward any portion of the documentary evidence, in original, if for special reasons it sees fit.

Any person, whether Appellant or Respondent, may apply to the High Court and specify any of the papers or exhibits in the case, copies of which he requires to be made, and thereupon copies of such paper or exhibits shall be made for him at his expense and given to him.

13. After receipt of the record as aforesaid, all applications regarding the appeal must be made to the Court of Appeal.

Notice of hearing.

14. On receipt of the record the Registrar of the Court of Appeal will serve notice of the date of hearing upon the Appellant and Respondent.

Such notice will ordinarily be served through the High Court.

15. The Court of Appeal may hear and determine an appeal without giving notice of the date of hearing to any person who has declared that he does not wish to attend the hearing.

Pauper Appellant.

16. If any Appellant alleges that he is unable to pay the fees on appeal, the High Court, upon application being made for that purpose, shall inquire into the question of the poverty of the Appellant, and, if it is satisfied that the allegation of poverty is true, it shall forward to the Court of Appeal the record of appeal, together with a declaration to that effect and a statement of the proportion of the fees, if any, the Appellant is able to pay; and no fees other than the above shall be payable either in the Court of Appeal or in the High Court. If the High Court is not satisfied as to the poverty of the Appellant, it shall forward the application to the Court of Appeal with a report as to the Appellant's means, but shall take no other step in the appeal without orders from the Court of Appeal.

Powers to be exercised by two Judges of the Court of Appeal.

17. In any case pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by two Judges of the Court of Appeal; and two Judges of the Court of Appeal may, at any time during vacation, make any interim order to prevent prejudice to the claims of any parties pending an appeal as they may think fit; but every such order made by two Judges may be discharged or varied by the Court of Appeal.

18. The following appeals may be disposed of by a Court consisting of two Judges:—

(*a.*) Appeals in cases in which the subject-matter of the appeal is less than 1,500 rupees, or £100.

(*b.*) Appeals in urgent cases with the written consent of both parties; such consent to be filed in the case.

Where Court equally divided in opinion.

19. If on hearing of an appeal the Court is equally divided in opinion, the appeal shall be dismissed.

If on the hearing of an application, not being in the nature of an appeal, the Court is equally divided in opinion, the opinion of the Senior Judge shall prevail:

Provided that, if on the hearing of an appeal or application by two Judges there is a difference of opinion upon a point of law, either of the Judges may require that the appeal or application be referred to a Court consisting of not less than three Judges.

Power of adjournment.

20. If for any reason it appears right to adjourn an appeal or application, the Court of Appeal shall have full power to do so upon such terms and for such time as seems fit.

Powers of amendment, &c., of Court of Appeal.

21. The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an Examiner or Commissioner. The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court notwithstanding that the Memorandum of Appeal may pray that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondent or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may be just.

Power to order new trial.

22. If, upon the hearing of an appeal, it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the Court of Appeal to order that the verdict and judgment shall be set aside, and that a new trial shall be had.

Interlocutory order not to prejudice Appeal.

23. No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may be just.

Stay of proceedings on appeal.

24. An appeal shall not operate as stay of execution or of proceedings under the decision appealed from except so far as the High Court or the Court of Appeal may order; and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

Interest where execution

25. On an appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed, unless the High

delayed by appeal.

Court or the Court of Appeal orders otherwise, and the taxing officer may compute such interest without any order for that purpose.

Securities, &c., where appeal to Privy Council.

26. On appeals to His Majesty in Council, all securities required by Article 9 (2) of the Appeals Order-in-Council shall be given, and all payments required by Article 9 (3) of the said Order, shall be made within three months after leave to appeal to His Majesty in Council has been given by the Court of Appeal.

Fees, &c., on appeals.

27. The following fees shall be taken on appeals :—

	Rs.	as.	p.
(A) In civil matters—			
1. On hearing the appeal	50	0	0
2. On Judgment...	50	0	0
3. In all matters under Rule 17 herein, one-half of above fees, provided that the Court may in such cases reduce either of the above fees			
(B) In criminal matters—			
1. On the appeal	10	0	0

On appeals to His Majesty in Council :—

	Rs.	a.	p.
(A) In civil matters—			
1. On application for leave to appeal	25	0	0
2. On judgment thereon	25	0	0
3. On making up the record of appeal, such sum as the Court of Appeal directs.			

The fee list at present in force in His Britannic Majesty's Court for Zanzibar, or any other fee list that may be substituted for it, shall be deemed to be the list of fees that shall be taken in matters other than those mentioned above.*

Address.

28. All communications and applications should be addressed to :—

The Registrar,
His Britannic Majesty's Court of Appeal
for Eastern Africa,
Zanzibar.

* NOTE.—A new table of fees leviable in the Court of Appeal is being brought into force. The scale is "*ad valorem*" making the total fees payable on appeal small where small sums are involved, and proportionately larger where larger sums are involved.

29. The Court of Appeal shall ordinarily sit in Zanzibar, at the Court-house for His Britannic Majesty's Court of Zanzibar; but may sit at such other place from time to time as occasion may render necessary or convenient. Place and time of sitting.

30. The Court of Appeal shall hold two ordinary sessions in each year, which shall commence on or as soon after the 1st March and the 1st September respectively, as shall be found convenient. Notice of each session and a cause list shall be published by the Registrar in the *Zanzibar Gazette*, and in the *Gazette* of each Protectorate, at least one month before the time appointed for such session; but nothing herein shall prevent the Court from sitting during vacation.

LINDSEY SMITH,
President of the Court of Appeal.

EAST AFRICA LEGAL PRACTITIONERS' RULES, 1901.

The following Rules made by the Protectorate Court, with the approval of the Secretary of State and of the Court for Zanzibar, are published for general information.

(Signed) R. W. HAMILTON,
Acting Judge of His Majesty's Court for the East Africa Protectorate.

MOMBASA, 25th April, 1901.

Rules under Article 44 *of* "*The East Africa Order-in-Council*, 1897."

No. 8 OF 1901.

LEGAL PRACTITIONERS.

I.

The following persons shall be entitled to practice before the Protectorate Court of the East Africa Protectorate, or any of the Courts subordinate thereto, upon the terms and subject to the conditions hereinafter contained :—

1. Members of the Bar of England, Scotland, or Ireland (hereinafter referred to as barristers).

2. Solicitors of the Supreme Court in England or Ireland, writers to the Signet and solicitors in the Supreme Courts in Scotland (hereinafter referred to as solicitors).

3. Pleaders who have been admitted to practise before one of the High Courts in India.

4. Native vakeels as hereinafter provided.

II.

Any barrister, solicitor, or pleader upon producing to the Protectorate Judge satisfactory proof of his qualification and such testimonials as to character as the Judge shall deem satisfactory, and upon payment of the prescribed fee, and upon signing the roll of the Protectorate Court shall be admitted to practise in the Protectorate Court and the Courts subordinate thereto. Such barrister, solicitor, or pleader will thereupon become and be styled a pleader of the Protectorate Court (hereinafter referred to as a pleader), and shall continue to be a pleader so long as he takes out the annual certificate to practise hereinafter referred to, and is not struck off the roll as hereinafter mentioned.

III.

Barristers, solicitors, and pleaders of a High Court in India will take precedence in the order named and as between themselves according to the date of their signing the roll of the Protectorate Court, provided always that any pleader appointed to represent His Majesty or the Protectorate Government, under whatever designation, shall take precedence of all other pleaders.

IV.

If, in the opinion of the Protectorate Judge, the number of pleaders is insufficient for the public requirements in any Court, he may, in his discretion, admit other persons of good character and sufficient capability to practise in that Court, but such persons shall only be licensed to practise during the pleasure of the Protectorate Judge.

V.

In any proceeding in the Protectorate Court or any of the Courts subordinate thereto native vakeels shall be entitled to represent natives upon similar conditions to those provided by the Native Courts Practitioners Rules for the time being in force.

VI.

The Protectorate Judge may, after such inquiry as he thinks fit, suspend or dismiss any pleader for any of the following causes :—

1. If he takes instructions in any case except from the party on whose behalf he is retained, or some person who is the recognised agent of such party, within the meaning of the Indian Civil Procedure Code, or some servant, relation, or friend authorised by the party to give such instructions.

2. If he is guilty of fraudulent or improper conduct in the discharge of his professional duty, or misleads, or allows the Court to be misled, so that the Court makes an order which he knows to be wrong or improper.

3. If he tenders, gives, or consents to the retention out of any fee paid or payable to him for his services of any gratification for procuring or having procured the employment in any legal business of himself or any other pleader.

4. If he directly or indirectly procures, or attempts to procure, the employment of himself as such pleader, through or by the intervention of any person to whom any remuneration for obtaining such employment has been given by him; or agreed or promised to be so given.

5. If he accepts any employment in any legal business through a person who has been proclaimed as a tout, as hereinafter mentioned.

6. If he is otherwise guilty of unprofessional conduct.

VII.

In the event of any pleader being suspended or dismissed under the last mentioned Rule, he shall be at liberty to appeal to the High Court at Zanzibar against the order of suspension or dismissal, but pending the hearing of his appeal he shall not be entitled to practise in the Protectorate. Provided always that nothing in this Rule shall be held to deprive any pleaders of the ultimate right of appeal to the Secretary of State provided for by Article 44 of "The East Africa Order-in-Council, 1897."

VIII.

"Tout" means a person who procures the employment in any legal business of any legal practitioner in consideration of any remuneration moving from such practitioner, or proposes to a legal practitioner to procure his employment in any legal business in consideration of such remuneration.

IX.

1. The Protectorate Judge and any subordinate Judge, or class of Judges, authorised by the Protectorate Judge may frame and publish lists of persons proved to his or their satisfaction by evidence of general repute or otherwise habitually to act as touts, and may from time to time alter and amend such lists.

2. No person's name shall be included in any such list until he shall have had an opportunity of showing cause against such inclusion.

3. A copy of every such list shall be kept hung up in every Court to which the same relates.

4. The Judge may by general or special order exclude from the precincts of his Court, or of any Court subordinate to himself, any person whose name is included in any such list.

5. Any person whose name is included in any such list shall be deemed to be proclaimed as a tout within the meaning of Rule VI. (5).

X.

No agreement entered into by any pleader with any person retaining or employing him respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done, or to be done, by such pleader shall be valid unless it is made in writing signed by such person, and is filed within such time and in such Court as may from time to time be prescribed by the Protectorate Court.

XI.

When a suit is brought to enforce any such agreement, if the agreement is not proved to be fair and reasonable, the Court may reduce the amount payable thereunder or order it to be cancelled, and the costs, fees, charges, and disbursements in respect of the business done to be ascertained in the same manner as if no such agreement had been made.

XII.

Such an agreement shall exclude any further claim of the pleader beyond the terms of the agreement with respect to any services, fees, charges or disbursements in relation to the conduct and completion of the business in respect of which the agreement is made, except such services, fees, charges, or disbursements, if any, as are expressly accepted by the agreement.

XIII.

A provision in any such agreement that the pleader shall not be liable for negligence or that he shall be relieved from any responsibility to which he would otherwise be subject as such pleader, shall be wholly void.

XIV.

On the admission of a pleader he will be granted a certificate to practise up to the 31st December next following the date of his admission, and every pleader desirous of practising thereafter shall renew his certificate on the 1st January in every subsequent year, and shall pay the prescribed fee upon the renewal of his certificate.

No pleader shall be entitled to practise in any year until he shall have taken out a certificate to practise during that year, and any pleader who shall infringe this Regulation shall be liable to be struck off the roll, and to pay a penalty of 100 rupees for each separate occasion on which he may practise without having obtained such certificate.

XV.

These Regulations may be cited as "The East Africa Legal Practitioners' Rules, 1901."

(Signed) R. W. HAMILTON,
Acting Judge of His Majesty's Court
for the East Africa Protectorate.

Approved:

(Signed) G. BETTESWORTH PIGOTT,
Acting Judge of His Majesty's Court for Zanzibar.

Approved:

(Signed) LANSDOWNE,
His Majesty's Principal Secretary of State for Foreign Affairs.

RULES

Under Article 48 (a) of "The East Africa Order-in-Council, 1897."

No. 9 OF 1901.

COURT FEES.

The fees specified in the Schedule annexed hereto shall henceforth be levied in addition to the fees specified in the Table annexed to the Rule made by Sir A. Hardinge on the 18th March, 1899.

(Signed) C. ELIOT,
MOMBASA, April 25th, 1901. *H.M. Commissioner and Consul-General.*

Approved:

(Signed) LANSDOWNE,
H.M. Principal Secretary of State for Foreign Affairs.

SCHEDULE OF FEES.

		Rs.	a.	p.
1.	On certificate of admission to practise in the Protectorate Courts	200	0	0
2.	On each annual renewal of such certificate	30	0	0

THE NATIVE COURTS PRACTITIONERS' RULES, 1899.

The following Rules made in accordance with Regulation 70 of "The Native Courts Regulations, $\frac{1897}{1315}$," relating to the right of audience of litigants, pleaders, and vakeels in Native Courts, are published for general information.

(Signed) CLIFFORD H. CRAUFURD,
H.M. Acting Commissioner and Consul-General.

MOMBASA, October 23rd, 1899.

In exercise of the powers conferred upon me by Article 70 of the Native Courts Regulations, $\frac{1897}{1315}$, extended by Rules of October 21st, 1899, I hereby make the following Rules for the conduct of business in Native Courts :—

I.

In any prosecution conducted against a native at the suit of the Crown, or in any Civil action between the Crown and a native, any party to the proceedings may be represented by a pleader of the Protectorate Court or by a professional vakeel as hereinafter defined.

II.

Except as aforesaid no barrister, solicitor, pleader or professional vakeel may appear in any case in the Chief Native Court or the Court of the Sheikh-Ul-Islam without the leave of the Judicial Officer, or in any other Native Court, without the leave of the Sub-Commissioner within whose Province such Native Court is situate.

III.

The Judicial Officer in the case of the Chief Native Court and the Court of the Sheikh-Ul-Islam and the Sub-Commissioner of a Province in the case of all Courts within his Province, may grant licenses to any natives to practise as professional vakeels for a period not exceeding one year. Provided always that no person shall be accorded a license to practise in that capacity until he shall have given security for his good behaviour to the extent of two responsible sureties who shall give a bond of Rs.1,000 each besides the personal bond of the vakeel in Rs.2,000.

IV.

Any native being a party to a judicial proceeding may appear in person or by a vakeel, provided that the vakeel is related to him or is his master or servant, or has been appointed by him as agent for general purposes unconnected with litigation, and no other person shall be heard as a vakeel in any judicial proceeding without the leave of the Court.

V.

Every vakalla must be registered, and the vakalla or a certified translation must be filed in the case to which it relates.

VI.

Every vakalla used in a judicial proceeding shall contain the following particulars:—

(*a.*) The full name and description of the person giving the vakalla and of the vakeel.

(*b.*) The date on which the vakalla is given.

(*c.*) The relationship of the giver of the vakalla to the vakeel or if there is no relationship between the parties the reason why the vakeel is chosen. Provided that in the case of a registered professional vakeel it shall be sufficient to state that the vakeel is a registered professional vakeel.

(*d.*) The precise business for which the vakeel is appointed.

(*e.*) The remuneration to be given to the vakeel for his services.

VII.

No vakalla shall be registered without the special leave of the Court unless it contains all the particulars required by Rule VI.

VIII.

Notwithstanding any agreement as to the remuneration to be given to a vakeel for his services the amount may be reduced by the Court if it appears to be excessive or for any other good and sufficient reason.

IX.

Women who give vakallas must, whenever practicable, attend personally before the Registrar of documents or a person appointed by him in that behalf to certify to the correctness of their vakallas. In

cases where this course is impracticable the Registrar or the Court shall satisfy himself or itself as to the correctness of the vakalla in such manner as he or it may deem sufficient.

X.

All professional writers of vakallas must be registered. It is the duty of writers of vakallas to satisfy themselves that the person giving a vakalla thoroughly understands the terms thereof.

Any breach of the provisions of this rule shall be punishable by fine, which may amount to Rs.100, or imprisonment either with or without hard labour for a term not exceeding one month in addition to any other punishment which the writer of the vakalla may have rendered himself liable to.

XI.

The following fees shall be payable under these Rules:—

	Rs.	as.	p.
On the registration of a professional vakeel every year	10	0	0
On the registration of a professional vakalla writer every year	5	0	0
On registering a vakalla to be used in a judicial proceeding	3	0	0

XII.

These Rules may be cited as "The Native Courts Practitioners Rules, 1899."

(Signed) CLIFFORD H. CRAUFURD,
H.M. Acting Commissioner and Consul-General.

MOMBASA, October 23rd, 1899.

EAST AFRICA PROTECTORATE.

HIS MAJESTY'S HIGH COURT OF EAST AFRICA.

Rules made by the High Court with the approval of His Majesty's Commissioner under Article 20 of the East Africa Order-in-Council, 1902.

No. 1 of 1902.

COURT FEES.

1. The fees specified in the schedule hereto annexed shall henceforth be levied in respect of the several proceedings mentioned therein.

2. These Rules may be cited as "The East Africa Court Fees Rules, 1902."

R. B. P. CATOR,
R. W. HAMILTON,
Judges of the High Court.

MOMBASA, December 2nd, 1902.

Approved:

C. E. ELIOT,
His Majesty's Commissioner.

(*As amended by Rules of Court* 3 *of* 1906).

SCHEDULE.

SCALE OF FEES TO BE LEVIED IN HIS MAJESTY'S HIGH COURT OF EAST AFRICA.

I.—CIVIL.

	Rs.	a.	p.
1. For taking particulars of plaint	0	8	0
2. In all suits unless otherwise specified—			
Where the amount involved is:—			
(*a.*) Not exceeding 10 rupees	0	8	0
(*b.*) Not exceeding 50 rupees	1	0	0
(*c.*) Exceeding 50 rupees and not exceeding 100 rupees...	2	0	0
(*d.*) Exceeding 100 rupees — An additional fee of 2 rupees for every 100 rupees or part thereof up to 1,000 rupees, and an additional fee of 1 rupee for every 100 rupees in excess of 1,000 rupees. The whole fee levied not to exceed 1,000 rupees.			
	Rs.	a.	p.
3. On submission of special case, to include hearing	30	0	0
4. In every suit where it is impossible to estimate the subject matter at a money value, and with regard to which no special fee is prescribed, unless in any class of cases the Judge otherwise orders	10	0	0

	Rs.	a.	p
Provided that in every case, where by reason of any finding or order of the Court, a declaration of ownership of any money or property is made, an *ad valorem* fee at the same rate as in fee 2 shall at once become payable, less the fee already paid.			
5. In a suit for arrears of rent by landlord against tenant where an order for the possession of the property occupied is sought from the tenant... ... ... — An *ad valorem* fee of 5 per cent. on the yearly rental of the property in addition to the fee leviable for recovery of rent under fee 2.			
6. Where no rent is claimed but order for possession only ... — An *ad valorem* fee of 5 per cent. on the yearly rental value of the property.			
	Rs.	a.	p.
7. On every interlocutory application, including the filing of an affidavit in support	3	0	0
8. On every order made thereon	2	0	0
9. On application for a mandamus or final prohibitory injunction unless the Judge otherwise orders	50	0	0
10. On every summons, motion, application, or demand taken out, made or filed (not particularly charged)	5	0	0
11. On every decree or order (not particularly charged) ...	2	8	0
12. On order of adjournment of hearing rendered necessary by default of either party (to be paid by that party) ... ... — Such sum as the Judge may order, not exceeding ...	10	0	0
13. On every warrant of execution against property:—			
(*a.*) Not exceeding 100 rupees ... — To include keeping possession for 15 days unless the Court otherwise orders	2	0	0
(*b.*) Exceeding 100 rupees and not exceeding 500 rupees ...	5	0	0
(*c.*) Exceeding 500 rupees and not exceeding 1,000 rupees ...	10	0	0
(*d.*) Exceeding 1,000 rupees and upwards	20	0	0
14. On taking or passing an account by an officer of the Court, otherwise than in Court, unless the Judge otherwise orders	10	0	0
And in addition for every hour or part thereof after the first spent in taking or passing such account ...	5	0	0

II.—Criminal.

15. On every summons or warrant issued at the instance of a private individual, unless specially directed by the Court, to be issued free of charge	2	0	0
16. For service:—			
(*a.*) Within 2 miles (English) of the Court issuing the same	1	0	0
(*b.*) Beyond that distance ... — Such fees as will cover the cost of service, but not less than 2 rupees.			
17. On hearing unless specially directed by the Court to be free	2	0	0

	Rs.	a.	p.
18. On warrant of commitment	1	0	0
19. On every recognizance or bail bond	1	0	0
20. On any proceedings taken at the instance of private individuals in respect of offences under Chapter XXI. of the Indian Penal Code fees shall be charged as far as possible upon the same scale as in a civil action for damages unless the Judge otherwise orders.			

PROBATE AND ADMINISTRATION.

20. On application for probate or administration	15	0	0
21. On oath for every executor, administrator, or surety ...	7	8	0
22. On every security	15	0	0

Provided that the sum levied in respect of fees 20, 21, and 22, shall not in the aggregate exceed five per cent. of the net value of the estate.

23. On probate or administration in the Protectorate — The like sum as was payable in England for stamp duty under section 27 of the Act 44 Vict. cap. 12, in like cases.

Provided that where the Judge shall be satisfied that estate duty under "The Finance Act, 1894" (57 & 58 Vict., cap. 30), or under "The Finance Act, 1896" (59 & 60 Vict., cap. 28,) or any Act amending the same, has been paid in the United Kingdom in respect of property passing on the death of the deceased situate at any place within the jurisdiction of the Court, it shall be lawful for the Court to repay to the legal personal representative the amount paid in respect of that property on obtaining probate or administration.

	Rs.	a.	p.
24. On filing account	10	0	0
25. On passing account	15	0	0
26. In the case of estates of less than 1,500 rupees gross value, in place of fees Nos. 20, 21, 22, 23, 24, and 25 ... ... — 5 per cent. on gross value of the estate, not exceeding 50 rupees			
27. On lodging a caveat	5	0	0
28. Where the Court itself winds up an estate or grants Probate or Administration to the Administrator-General of the Protectorate in his official capacity, a fee shall be charged at the rate of 2½ per cent. upon the total amount realized and 2½ per cent. upon the total amount distributed.			

These fees for the present retain their numbering under Rules 1 of 1902.

III.—BANKRUPTCY AND LIQUIDATION BY ARRANGEMENT OR COMPOSITION.

	Rs.	a.	p.
21. On declaration by a debtor of inability to pay his debts ...	4	0	0
22. On application under Chapter XX. of the Code of Civil Procedure	4	0	0
23. On bankruptcy petition	80	0	0
24. On petition for arrangement or composition	15	0	0
25. On order of adjudication	15	0	0
26. On meeting or adjournment of meeting	15	0	0
27. On order of discharge	30	0	0
28. On notice to creditors (each)	0	4	0

	Rs.	a.	p
29. On preparing advertisement	4	0	0
Provided that if, on account of the small value of the estate, the Judge thinks fit to reduce any of the above fees (numbered 21 to 29), he may do so.			

IV.—MISCELLANEOUS.

30. For service of summons, petition, answer, motion-paper, notice, warrant, decree, order or other document on a party, witness, assessors, or other person under any branch whatever of the civil jurisdiction—			
(*a.*) Within 2 miles (English) of the Court issuing the same	1	0	0
(*b.*) Beyond that distance	Such fees as will cover the cost of service, but not less than 2 rupees.		
31. On the issue of every witness summons	1	0	0
32. For attending to view, in addition to all expenses incurred, unless the Judge otherwise orders	10	0	0
33. On taxation of any bill of costs, for every ten folios ...	5	0	0
34. On deposit of any document	15	0	0
35. For taking an affidavit	1	0	0
36. For every exhibit to an affidavit or declaration	0	8	0
37. For attending to administer an oath or affirmation, or to take a declaration elsewhere than at the offices of the Court, in addition to the ordinary fee thereon	5	0	0
38. On every deposition taken by the Judge before trial ...	5	0	0
39. On evidence taken on commission—			
(*a.*) To be charged by the officer taking the evidence ...	10	0	0
(*b.*) And in addition for every hour or part thereof after the first	5	0	0
40. On balances of estates of deceased persons paid into Court	$2\frac{1}{2}$ per cent. on the amount of value up to 1,000 rupees and 1 per cent. above, in no case exceeding a total fee of 50 rupees.		
41. For superintending or taking an inventory			
42. On deposit of any money or valuables in Court			
43. On payment of money into Court in an action	1 per cent. not exceeding a total fee of 25 rupees.		
44. On filing in the High Court any document for the filing whereof no other special fee is prescribed under the present Schedule	2	0	0
45. On filing in any Court, other than the High Court, any document for the filing whereof no other special fee is prescribed under the present Schedule	1	0	0
46. For certifying signature or seal	4	0	0
47. Certifying documents for use in judicial proceedings—			
(*a.*) For first folio of 100 words	2	0	0
(*b.*) For each subsequent folio or part thereof	1	0	0
(*c.*) All certificates not otherwise provided for	2	0	0

	Rs.	a.	p.
48. For attendance of an officer of the Court at a sale... ...	10	0	0
And in addition for every hour or part thereof after the first	5	0	0
49. On reference to the archives	2	0	0
50. For certified copy of any document in the archives—			
(*a.*) For the first folio of 100 words	2	0	0
(*b.*) For each subsequent folio	1	0	0
51. For uncertified copy of any document in the archives—			
(*a.*) For the first four folios or part thereof	1	0	0
(*b.*) For each subsequent folio	0	4	0
52. For an official certified translation of any document—			
(*a.*) For first folio...	8	0	0
(*b.*) For each subsequent folio	4	0	0
(*c.*) For certifying translation by a party for first folio	4	0	0
Each subsequent folio or part thereof	2	0	0
53. For communication with another Tribunal out of the jurisdiction of the Court	8	0	0
54. For communication with another Tribunal within the jurisdiction of the Court	2	0	0
55. On every recognizance or bail bond	1	0	0
56. On a reference to the High Court other than an appeal unless the Judge otherwise orders	10	0	0
57. Reference to Archives—			
Inspection of files of pending cases may at discretion of the Judge be granted free to parties directly interested, subject to this exception...	2	0	0

V.—Appeal.

(A.) On Appeals from any Court within the Protectorate to any other Court within the Protectorate.

(i.) *In Civil Matters.*

58. On filing a memorandum of appeal	An *ad valorem* fee of 4 rupees for every 100 rupees or part thereof such fee not to exceed 40 rupees.

Provided that, if the appeal be abandoned, half the fee shall be returned.

59. On every appeal where it it not possible to estimate the subject-matter at a money value	A fee not to exceed twice the fee charged in the lower Court.

Provided that, if the appeal be abandoned, half the fee shall be returned.

	Rs.	a.	p.
60.—(*a.*) On every appeal from a Special Native Court under Ordinance 31 of 1902 when amount in dispute does not exceed Rs.1,000 an inclusive fee of	10	0	0
(*b.*) In other cases such fee as is provided in Article 58.			
61. On every security for costs	5	0	0

(ii.) *In Criminal Matters*

	Rs.	a.	p.
62. On filing a memorandum of appeal	10	0	0
Provided that the Judge may reduce this fee at his discretion.			
63. On every appeal from a special Native Court under Ordinance 31 of 1902 an inclusive fee of	10	0	0

(B.) On Appeal from the High Court to the Court of Appeal for Eastern Africa.

(i.) *In Civil Matters.*

	Rs.	a.	p.
64. On filing memorandum of appeal against decree	10	0	0
65. On filing memorandum of appeal against interlocutory order	5	0	0
66. On every security for costs	5	0	0
67. On record of appeal (including expenses of transmission)	Such sum as the Court may direct.		

(ii.) *In Criminal Matters.*

	Rs.	a.	p.
68. On the appeal	10	0	0
Or such lesser sum as the Court may direct.			

VI.—On Admission of Legal Practitioners.

69. On certificate of admission to practice	200	0	0
70. On each annual renewal of such certificate	30	0	0

The following Fees are leviable under the Divorce Ordinance and the Notaries Public Ordinance.

I.—Fees Leviable under the Divorce Ordinance, 1904, Section 43, *vide* Divorce Rules, 1906.

1. On a petition for a dissolution or declaration of nullity of marriage, or for a Judicial separation or restitution of conjugal rights:

	Rs.	a.	p
(*a.*) In non-native cases	75	0	0
(*b.*) In native cases	15	0	0

2. Where a protection order is prayed for — a fee calculated upon the estimated value of the property to be protected according to the ordinary scale for civil actions.

3. In all other cases the ordinary schedule of fees for civil actions shall apply.

II.—Fees Payable under the Notaries Public Ordinance, 1906.

		Rs.	a.	p.
(i.)	On appointment as a Notary Public for a licence to practise until 31st December after such appointment ...	100	0	0
	Annual renewal of such certificate	30	0	0
(ii.)	1. For noting a Marine Protest and furnishing one certified copy if required	5	0	0
	2. For filing a request for survey and issuing order of survey	7	8	0
	3. For receiving report of survey, filing original in archives (if not exceeding 200 words) and furnishing, if required, one certified copy of request, order, and report of survey	15	0	0
	4. For extending Marine Protest, if not exceeding 200 words, filing original and furnishing one certified copy if required. This is to be exclusive of any fee for oaths or declarations, or for drawing, if required, the body of the protest	15	0	0
	5. For any other Protest, if not exceeding 200 words, filing the original and furnishing one certified copy, if required. This is to be exclusive of any fee for drawing, if required, the body of the protest	15	0	0
	6. If the Protest or report of survey exceed 200 words, for every additional 100 words or fraction thereof	2	0	0
	7. For administering an oath, or receiving a declaration or affirmation, without attestation of signature	1	0	0
	8. For administering an oath, or receiving a declaration of affirmation, with attestation of signature	5	0	0
	9. For each signature attested by a Notary Public in any document not otherwise provided for	5	0	0
	10. For certifying to a copy of any document or part of a document, if not exceeding 100 words	5	0	0
	11. For uniting documents and attaching Notary Seal to the fastening	2	0	0
	12. For directing search for, or obtaining, from public Record Office or elsewhere, extracts from local registers, or copies of wills, deeds, or other matters, in addition to expenses incurred and any fees for attestation	5	0	0
	13. For affixing Notary signature, and seal if required, to any document not otherwise provided for by this table ...	5	0	0
	14. For each Notary Public seal affixed to a document, packet, or article, when no signature is required	5	0	0
	15. Any other Notarial act not specified above...	5	0	0

H.M. HIGH COURT OF EAST AFRICA.

Rules made by the High Court with the approval of H.M. Commissioner under Article 22 of the East Africa Order-in-Council, 1902.

NO. 1 OF 1903.

REFERENCE TO ARCHIVES.

1. These Rules may be cited as "The High Court Archives Rules, 1903."

2. In these Rules "Archives" shall mean:—

(*a.*) Notes taken by the Judge and evidence recorded in a case.

Any pleading, application, order, exhibit, or other document made, recorded, or filed in a case.

(*b.*) Indices of cases and Cause Lists.

3. In these Rules the word "Judge" shall include "Magistrate," or any other person acting in a judicial capacity, and the term "person directly interested" shall include the properly authorised representatives of such person.

4. Reference to the Archives may be made on the terms and in the manner following only.

5. Application for reference to an Archive must be in writing, signed by the person making it, and addressed to the Judge or, as regards the Archives of the High Court or the Mombasa Courts, to the Registrar of the High Court.

The order of the Judge or Registrar will be endorsed on the application so presented.

6. Inspection of the files of pending cases may at the discretion o the Judge be granted free of charge to parties directly interested but subject to this exception every application must bear a stamp of Rs.2. unless the fee is specially remitted or reduced by the Judge on account of the poverty of the applicant.

7. In civil cases a person directly interested will ordinarily be permitted to refer to any Archive, and in civil cases decided more than a year before the date of application the provisions of this Rule will apply to the general public.

8. In civil cases which are pending or have been decided less than a year before the date of application, inspection of an Archive by a person not directly interested will only be permitted on special grounds.

9. In criminal cases leave will ordinarily be granted to any person affected by a judgment or order of the Court to refer to an Archive relating to his case. A person other than the person affected as aforesaid will not ordinarily be permitted to inspect a criminal file, and only in very special cases will inspection be granted of anything besides the judgment.

10. Unless specially ordered to the contrary a person who has obtained leave to refer to an Archive shall be entitled to have a copy thereof, and if application for the copy be made within seven days of inspection the fee paid for reference will be treated as part payment for the copy, and the rates will be such as may for the time being be prescribed by the fee table. No reference fee will be charged on an application for copies of Archives required for the purposes of an appeal or application for revision.

The estimated cost of copies must be deposited in Court when the copies are bespoken, unless the applicant's undertaking to pay on demand be accepted in lieu thereof.

11. Reference may be made to the cause-list of the day, and of the suits set down for hearing, on verbal application to the clerk of the Court without payment.

12. Archives may only be inspected in the Court precincts and in the presence of an officer of the Court except with the special permission of the Judge.

13. No person who has obtained permission to refer to an Archive may make any mark or erasure thereon or remove it or show it to a third party or make any copy or note therefrom except a note of the date or title.

R. B. P. CATOR,
Judge of the High Court.

MOMBASA, August 24th, 1903.

Approved:
C. ELIOT,
His Majesty's Commissioner.

H.M. HIGH COURT OF EAST AFRICA.

Rules made by the High Court with the approval of His Majesty's Commissioner under Article 22 of the East Africa Order-in-Council, 1902.

No. 2 OF 1903.

COURT VACATIONS.

1. These rules may be referred to as "The Courts Vacations Rules.

2. The Vacations of the High Court will be from the 20th of December to the 31st of January, and from the 30th of June to the 21st of July inclusive.

3. During Vacation the High Court will only sit for the transaction of business of an urgent nature.

4. All the Courts and Court Offices will be closed on such days as are advertised as Government holidays save that arrangements will be made for the taking of police cases and urgent business.

5. During Vacation the Town Magistrates of Mombasa, Nairobi and Kisumu will only hear civil cases of an urgent nature or those in which pleaders are not engaged.

R. B. P. CATOR,
Judge of the High Court.

MOMBASA, December 2nd, 1903.

Approved :
C. ELIOT,
His Majesty's Commissioner.

H.M. HIGH COURT OF EAST AFRICA.

Rules made by the High Court with the approval of His Majesty's Commissioner under Article 22 of the East Africa Order-in-Council, 1902.

Rules of Court No. 1 of 1904.

Pleaders' Costs in Subordinate Courts.

1. These Rules may be cited as "The Subordinate Courts Pleaders Costs Rules, 1904."

2. The following rules shall be observed in the taxation of costs in all non-native cases in Courts subordinate to the High Court.

3. Pleaders costs will not usually be allowed in native cases, but may be allowed in special cases at the discretion of the Judge.

Provided that under no circumstances may Pleaders costs be allowed unless permission to plead has been granted under the provisions of the Native Courts Practitioners Rules, 1899 (No. 21 of 1899).

4. If the Plaintiff in any action has not given the Defendant notice of his intention to sue, and the Defendant pays the amount claimed at or before the first hearing no costs whatever will be allowed.

5. If the Defendant admits the claim at or before the first hearing Court costs only will usually be allowed, provided that if the Defendant appears to have put the Plaintiff to any unnecessary trouble in obtaining a Judgment the Court may allow a fee in addition to the Court costs.

6. Subject to the provisions of Rule 8, Pleaders costs will not be allowed to either party when the amount recovered does not exceed Rs. 75 or, in case the action is dismissed, when the amount claimed does not exceed that sum.

7. Subject to any special order of the Judge, when an order has been made in general terms for the payment of the costs of an action by either party in cases where more than Rs.75 has been recovered or, if the action has been dismissed, when the amount claimed exceeds Rs.75, and a Pleader has been employed, costs calculated upon the

following scale may be allowed to the successful party in addition to his Court costs.

Exceeding	Rs.75	and	not	exceeding	Rs.150	...	Rs.	15
„	150	„		„	300	...	„	30
„	300	„		„	400	...	„	40
„	400	„		„	500	...	„	45
„	500	„		„	600	...	„	55
„	600	„		„	700	...	„	60
„	700	„		„	800	...	„	65
„	800	„		„	900	...	„	70
„	900	„		„	1000	...	„	75
„	1000	...	...	...	...	...	„	7½%

8. The Judge may for special reasons to be certified by him allow Pleaders costs in any case in which costs are not allowed under the foregoing rules and may similarly allow costs in addition to the Pleaders costs provided by the scale, or may refuse to allow any Pleaders costs or may allow costs on a lower scale to that specified in Rule 7.

R. B. P. Cator,
R. W. Hamilton,
Judges of the High Court.

Approved:
C. Eliot,
His Majesty's Commissioner.
Dated 4th April, 1904.

H.M. HIGH COURT OF EAST AFRICA.

Rules made by the High Court with the approval of His Majesty's Commissioner under Article 22 of the East Africa Order-in-Council, 1902.

Rules of Court No. 2 of 1904.

Filing High Court Actions and Appeals in Local Registries.

(1.) These Rules may be cited as "The High Court Local Registries Rules, 1904."

(2.) In the case of any action triable in the High Court or by a Judge of the High Court, which apart from its nature or the value of the subject matter would be triable in the Provinces of Kisumu, Ukamba, Kenia or Naivasha it shall be lawful for the Plaintiff to

institute proceedings as regards the Province of Kisumu in the Court of the Protectorate Magistrate at Kisumu and as regards the Provinces of Ukamba, Kenia and Naivasha in the Court of the Protectorate Magistrate at Nairobi.

(3.) Such actions shall be intituled as actions instituted in the district Registries of the High Court at Kisumu or Nairobi as the case may be, and shall be serially numbered accordingly.

(4.) All formal and preliminary steps and all interlocutory applications in such actions shall be taken and made in the Courts of the said Magistrates and when any such action is ready for trial it shall be set down for trial before a Judge of the High Court at the next ensuing Sessions at Kisumu or Nairobi as the case may be.

(5.) An appeal shall lie to a Judge of the High Court from all interlocutory orders made by the Protectorate Magistrate in any such action.

(6.) In any case where an appeal lies to the High Court or any Judge thereof from any judgment or order of any Judge or Magistrate in the provinces aforesaid other than an appeal against an interlocutory order in a High Court action the Appellant may lodge his appeal in the district Registry of the High Court at Kisumu or Nairobi as the case may be and may notify that he wishes to have his appeal heard locally.

(7.) In the case of any notice of appeal being so lodged with such notification as aforesaid the appeal shall be set down for hearing before a Judge of the High Court at the next ensuing Sessions at Kisumu or Nairobi as the case may be.

Provided that the High Court or a Judge thereof may order that such appeal be heard at Mombasa or elsewhere.

R. B. P. CATOR,
R. W. HAMILTON,
Judges of the High Court.

Approved:
C. ELIOT,
His Majesty's Commissioner.
Dated, April 19th, 1904.

H.M. HIGH COURT OF EAST AFRICA.

Rules made by the High Court under Article 10 *of the East Africa Native Courts Amendment Ordinance* 1902 (*No.* 31 *of* 1902).

RULES OF COURT No. 3 OF 1904.

Short title.

(1.) These Rules may be cited as the "Special Native Courts Procedure Rules 1904."

Attendance of parties.

(2.) If either party to a suit does not appear at the time fixed for the hearing further opportunity should ordinarily be given to the defaulting party to appear.

(3.) If the party through whose fault an adjournment has been rendered necessary cannot give a sufficient excuse for his absence he may be ordered to pay such reasonable sum as the Court may deem fit, from which the Court may award expenses to a party who has duly attended.

Execution.

(4.) Execution against a judgment debtor's person or his property shall not issue till the debtor has been called on to show cause against an order being made.

Imprisonment in civil suit.

(5.) In the case of persons ordered to be imprisoned under any provision of the Civil Procedure Code the imprisonment may be either simple or rigorous.

Transmission of records.

(6.) Immediately upon the conclusion of a criminal case requiring confirmation by the High Court, the original records and exhibits shall be forwarded to the Registrar of the High Court.

Sentence pending confirmation.

(7.) In cases where sentences require confirmation the accused must be remanded until the decision of the High Court has been received.*

Petition of appeal must be in writing.

(8.) Every petition of appeal shall be in writing and shall contain the grounds on which the applicant relies.

Place of filing appeal.

(9.) An appeal may be filed:

(*a.*) In the Court passing the decree, judgment, order, or sentence appealed against.

(*b.*) In a Local Registry under Rules of Court (No. 2) of 1904.

(*c.*) In the High Court at Mombasa.

NOTE.—In such cases the special commitment warrant (Form No. 102A) should be used.

(10.) An appeal must be filed within thirty days of the date of any decree, judgment, order or sentence appealed against. Time for filing.

(11.) If the appellant is illiterate his petition shall be reduced to writing by the officer with whom it is filed, and officers shall assist ignorant persons to put their appeals in proper form. Illiterate appellant.

(12.) The petition if filed elsewhere than in the High Court or a local Registry shall together with the original records be transmitted forthwith to the Registrar of the High Court who will give all necessary directions in the matter. Procedure.

(13.) The attendance of an appellant shall not be necessary to the hearing of an appeal. Attendance of appellant not necessary.

(14.) In criminal cases requiring confirmation or where an appeal has been lodged the accused may be admitted to bail by the Court which has passed the order or sentence. Bail.

(15.) Except in so far as they may be varied by these rules the provisions of the Indian Civil and Criminal Procedure Codes shall apply so far as may be reasonably practicable. Application of Indian Civil and Criminal Procedure Codes.

(16.) The fee payable on appeals shall be as follows :— Fees.

I.—In civil cases :—(*a.*) When the amount in dispute does not exceed Rs.1,000, an inclusive fee of Rs.10. (*b.*) In other cases such fee as is provided in the schedule of general Court fees.

II.—In criminal cases :—An inclusive fee of Rs.10.

(17.) Except as hereinbefore otherwise provided the fees to be charged both in civil and criminal proceedings shall be such as may be prescribed from time to time by the High Court fee schedule.

R. B. P. Cator,
R. W. Hamilton,
Judges of the High Court.

Mombasa, 13th September, 1904.

H.M. HIGH COURT OF EAST AFRICA.

Rules made by the High Court with the approval of His Majesty's Commissioner under Article 22 of the East Africa Order-in-Council, 1902.

The following shall be the form of a Letter of Request to a foreign tribunal to examine witnesses abroad.

R. W. HAMILTON,
Principal Judge of the High Court.

MOMBASA, 4th January, 1906.

Approved :
J. HAYES SADLER,
His Majesty's Commissioner.
MOMBASA, 4th January, 1906.

RULES OF COURT No. 1 OF 1906.

Whereas an action is now pending in the High Court of East Africa at Mombasa, in which is Plaintiff and is Defendant. And in the said action the Plaintiff claims (insert endorsement on writ).

And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say: E. F. of , G. H. of , and I. J. of .

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court.

Now I as the Judge of the High Court of East Africa have the honour to request, and do hereby request, that for the reasons aforesaid and for the assistance of the High Court of Justice, you as the President and Judges of the said or some one or more of you, will be pleased to summon the said witnesses (and such other witnesses as the agents of the said Plaintiff and Defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you, or such other person

as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (or *vivâ voce*) touching the said matters in question in the presence of the agents of the Plaintiff and Defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same, together with such request in writing, if any, for the examination of other witnesses, through His Majesty's Secretary of State for Foreign Affairs, for transmission to the said High Court of the East Africa Protectorate.*

PUBLIC NOTICE RELATING TO MAHOMEDAN MARRIAGES.

It is reported that a common practice is going on in the town of Mombasa which is unlawful according to the Sheriah. LET it be known that a man who has a right to perform a marriage is a guardian, which is, according to Sheriah :—

1. Father ; in his absence,
2. Grandfather ; in his absence,
3. Full brother ; in his absence,
4. Son of brother ; in his absence,
5. Uncle on father's side ; in his absence,
6. Neârest relative on father's side.

Where there is no near relative, the marriage should be performed by a Kathi of Government.

FURTHER, let it be known that after this notice anyone who performs a marriage without right according to Sheriah will be punished.

11 Shaban, 1321.
2 Nov., 1903.

(Sgd.) MOHAMED BIN KASSIM, KATHI, MOMBASA,
ABDULRAHMAN BIN AHAMED, SHEIKH UL ISLAM.

Approved :

J. W. TRITTON, *Sub-Commissioner.*
R. B. P. CATOR, *H.M. Judge.*
7th December, 1903.

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* NOTE.—In addition to the signature of the Judge and the seal of the Court, the request should be also countersigned by the Officer administering the Government.

HIGH COURT CIRCULAR NOTICE.

AND INSTRUCTIONS FOR THE INFORMATION OF MAGISTRATES, JUDGES, SUPERINTENDENTS OF JAILS AND THE POLICE.

Returns, Instructions as to.

1. On the expiration of each calendar month a return of all cases tried or judicially inquired into during the month must be made out upon the forms provided for the purpose and posted direct to the Registrar of the High Court at Mombasa. If there has been no case for the month a "nil" return must be despatched. No covering letter should be sent.

Officers subordinate to any Sub-Commissioner will also forward a duplicate return to the Sub-Commissioner of their Province unless excused by him from doing so.

2. The return should, if possible, be posted on the first of the month succeeding that for which the return is made.

If the return form be entered up every few days there should be no difficulty in complying with this requisition.

3. Every return must be signed by the officer who sends it in, provided that if there has been a change of officers during the month the officer sending in the return should see that his predecessor has signed the return up to the date on which the change has been effected.

Officers are responsible for the correctness of all returns that they sign. The Judge personally examines every return and pays special attention to the manner in which the returns are made up.

4. In filling up the forms the following points should be attended to :—

(*a.*) The nature of the charge in criminal matters should be set out with reasonable fullness. In cases of theft for instance, the nature of the thing stolen and its approximate value must be recorded, and in cases of assault the nature of the assault. It is imperative in every case that the Section of the Penal Code, or the Regulation or the Native Law under which a man is charged should be inserted.

(*b.*) In civil cases, not being claims for cash, the estimated value of the matter in dispute must be stated if possible.

(*c.*) The sentence or decision of the Court should be recorded without comment or explanation unless for special reasons the Officer thinks that a note should be appended.

(*d.*) In cases where a sentence given by an Officer holding a special Court needs confirmation, a note must be made on the return

that the case has been sent for confirmation or has been confirmed, as the case may be.

(*e.*) If the space provided on the returns be too small for the contemplated entry a second or third line should be used. It is of no importance that each case should be confined to a single line on the return form.

(*f.*) The centre space on the form is intended to provide a binding edge and must not be written upon.

(*g.*) The name of every accused person must be recorded on the return. It is not enough to make such an entry as that, "Ali bin Saleh and twenty others," are charged with a certain offence.

(*h.*) Particulars of pending cases are not required, but a memorandum must be entered at the foot of each return giving their serial number, *e.g.*:

Cases pending 4. Nos. 31, 39, 40, 41.

(*i.*) When more than one sheet is required for a month's return the name of the Court and the period to which the return applies must be inserted on each sheet.

(*j.*) In the case of Officers hearing appeals from Subordinate Courts the appeal cases must be kept distinct from cases tried under the original jurisdiction and must be shown separately on the returns.

Criminal Cases Procedure before Magistrates.

5. Magistrates must be particularly careful to frame and record a charge in every criminal case in which a charge is necessary in accordance with the requirements of Chapter XIX. of the Indian Penal Code, and in the case of summary trials to note the particulars of the offence with which the accused is charged. Attention is also directed to Section 344 of the Criminal Procedure Code relating to the remand of prisoners. No prisoner may be remanded for an indefinite time, nor may he be remanded for a period exceeding fifteen days on any one occasion. If it is necessary to keep a prisoner under remand for a longer time he must be brought before a Magistrate and remanded afresh, and the reasons for the remand must be recorded.

Warrants for prisoners.

6. Under no circumstances may a prisoner be detained in prison without a warrant, and the original warrant of remand, commitment or sentence must follow the prisoner wherever he may be, with such endorsement as may be necessary when he is removed from one prison to another. There must be a separate warrant for each prisoner.

Superintendents of prisons are prohibited from keeping a prisoner without a proper warrant.

Except in so far as arrests without warrant may be specially authorised by law no excuse will justify the keeping a man in custody

without a warrant, and officers (and askaris) render themselves liable to an action for damages and possibly to punishment if they hold prisoners without a proper warrant.

Arrests by police.

7. No person may be arrested by the police for a non-cognizable offence except under a warrant. If the warrant is to be acted upon outside the local limits of a Magistrate's jurisdiction it should be forwarded to a Magistrate in the place where the accused is supposed to be. (The proper authority in Mombasa is the Town Magistrate.) The receiving Magistrate will back the warrant and see that it is executed.

8. If it is necessary to apply for an arrest by telegraph the request should give the fullest possible description of the person to be arrested, and must contain the following particulars :—

(*a.*) A short statement of the alleged offence.

(*b.*) The amount of bail that may be accepted if it is a bailable offence.

(*c.*) The fact that a warrant for the accused's arrest has actually been issued.

(*d.*) In civil cases the number and title of the case, the cause of action and the amount of the claim or security required to be paid or given to allow of his release.

Magistrates and Police Officers may not act upon any telegraphic instructions if these particulars are not furnished.

On receipt of a telegram containing the particulars above mentioned the receiving Magistrate will issue his own warrant in the terms of the telegram and cause it to be executed.

9. The police may not effect an arrest in cognizable cases on telegraphic instructions unless the telegram contains the following particulars :—

(*a.*) A short statement of the alleged offence.

(*b.*) The amount of bail that may be accepted if it is a bailable offence.

If there is a Magistrate in the locality where a person has been arrested on telegraphic instructions, the accused must not be sent to any other Magistrate or Police Official, but must be taken before the Local Magistrate who will decide if he will grant a warrant to authorise the accused's detention or removal elsewhere.

10. Section 61 of the Criminal Procedure Code directs that no police officer shall detain a person arrested without a warrant in custody for a

longer period than under all the circumstances of the case is reasonable, and that in the absence of a special order from a Magistrate under Section 167 the period shall not exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

The attention of the police is particularly drawn to the fact that they must bring the accused before a Magistrate as soon as possible. They are not entitled to keep a man under arrest for twenty-four hours if they can bring him before a Magistrate before the expiration of that period.

Magistrates should call the attention of the High Court to every infraction of the law in this particular.

11. Section 62 of the Procedure Code requires that officers in charge of police stations shall report to the District Magistrate the cases of all persons arrested without warrant within the limits of their respective stations. It will be sufficient if such cases are reported in the first instance to the Collector, Town Magistrate or other Magistrate taking cognizance of police cases, but the police must furnish the High Court Registrar with a return of such cases every three months.

Special native Courts.

12. The attention of officers hold Special Native Courts under the East Africa Native Courts Amendment Ordinance, 1902, is particularly drawn to Article 12 which provides that no sentence exceeding twenty-five† lashes or six months' imprisonment shall be carried into effect until confirmed by the High Court.

This means that a punishment of twenty-five lashes and one day's imprisonment, or six months' imprisonment and a fine of a rupee, or any other maximum of whipping or imprisonment, coupled with a small punishment of another kind must be sent for confirmation.

Officers holding special Courts should bear in mind that, as they are invested with extensive jurisdiction and great responsibility, their cases should be conducted with exceptional care and attention.

Commitment to Sessions.

13. An Officer holding an inquiry with a view to a commitment to Sessions must deal with the case as fully as if he had himself to pronounce a final decision. He must make every effort to procure all witnesses who may be able to testify either on behalf of the prosecution or accused, and he must see that all the provisions of Chapter XVIII. of the Code are complied with.

Officers should not act as if a *primâ-facie* case alone were requisite to justify a commitment to Sessions. All evidence procurable must be taken at the inquiry. Sessions cases often break down because the committing Magistrates have not taken the trouble to get them up properly.

† Note.—*Cf.* Circular to Magistrates No. 2 of 1906, p. 157. The number of lashes should not exceed 24.

14. When cases are committed for trial to Sessions the following rules must be observed:—

(*a.*) The committing Magistrate will send the prisoner under a warrant to the superintendent of the Jail at the place where the Sessions are to be held. The warrant will be made out on the forms provided for the purpose. Inconvenience has occasionally arisen from Magistrates sending committed prisoners to the Sub-Commissioner instead of direct to the Superintendent of the Jail.

(*b.*) Upon making the commitment, the committing Magistrate must at once send the file containing the depositions direct to the Registrar of the High Court.

The Magistrate will observe the directions contained in Section 218 of the Criminal Procedure Code and must be careful to send the prescribed notice to the Crown Advocate as Public Prosecutor. If so required by the Sub-Commissioner of the Province the Magistrate will also give notice of the commitment to the Sub-Commissioner.

(*c.*) Sessions are held at Mombasa on the first Monday of every month and at Nairobi in the months of January, April, July and October, and elsewhere as occasion may require, and all witnesses both for the prosecution and the defence must be bound over to attend, and security be taken for their attendance at the first Sessions day after the commitment which allows sufficient time for them and the accused to reach the place to which the accused has been committed and for notice to be given to the Public Prosecutor. In case of ignorant witnesses the committing Magistrate must see that they leave their homes in time and in the case of Washenzi he must send them to the Superintendent of the Jail, or to the Collector, stating for what purpose they are sent, and accommodation will be provided for them until the trial in which they have to give evidence takes place.

If any variation in this procedure is desirable in any special case, the Crown Advocate will communicate with the committing Magistrate.

(*d.*) The committing Magistrate must see that witnesses are provided with whatever may be necessary to enable them to reach the place where the Sessions are to be held, and should direct them to apply to the Registrar or the Clerk of the Court for any expenses they may be put to after arrival.

Compensation out of fines.

15. Magistrates are reminded that in criminal cases when it appears just that a sum of money should be paid to the injured party, the directions in Section 545 of the Criminal Procedure Code must be observed.

The Court will impose a fine, and will direct that the whole or a portion of it when collected be paid to the injured party, and should not order one party to pay a sum to the other party directly.

16. Officers should be careful to remember that fines are only to be inflicted in proper cases as a punishment for offences, and are not to be looked upon as a source of revenue.

Appeals.

17. The periods within which appeals in native cases may be prosecuted have been assimilated to those in force in the case of British subjects, as laid down in the second division of the second Schedule to the Indian Limitation Act.

It may be said generally that in most cases of appeals from Provincial and Collectors' Courts the period allowed for appealing will be thirty days.*

Civil cases.

18. In civil cases the Judge should be careful to frame the issues to be tried before proceeding with the action.

19. In cases where a Defendant does not appear on the day named for trial Officers should be chary of giving judgment for the Plaintiff, and should be careful to satisfy themselves that the Defendant's absence does not arise from ignorance or accident.

In cases where judgment has been given for the Plaintiff in default of the Defendant's appearance, opportunity should be always granted to the Defendant of stating his case subject to the payment of such costs (including a further hearing fee) as may be just.

Fees to be levied.

20. Fees or their value in kind must be levied in strict accordance with the fee schedule in all civil cases, unless a litigant is specially exempted from paying them on the ground of his poverty.

Exhibits.

21. When a document or article is produced in evidence the following procedure should be observed:—

(*a.*) It should be at once marked by the Court with a distinguishing number (to which a marginal reference in the notes of the case should be made), the number of the case in which it is produced, the date, the designation of the person on whose behalf it is produced, and the signature of the Judge.

(*b.*) The series of numbers should be consecutive and when documents are produced by both Plaintiff and Defendant two series should be kept, that for the Plaintiff being marked numerically and that for the Defendant alphabetically.

* Note.—The period is 30 days in all appeals from Special Native Courts. *Cf.* Rules of Court, No. 3 of 1904, Art. 10, p. 143.

(*c.*) The following is an example of the manner in which the record should be kept, when documents are exhibited :—

John Brown, sworn, states :—I live at Nairobi. I know the Defendant, he is my partner in a bakery at Mombasa. I produce

(1.) the partnership deed (Exhibit 1.)

We are still partners, the partnership has never been dissolved.

X. Xd. I recognise the letter produced.

(A.) It was written by me (Exhibit A.)

These documents should be marked respectively.

$$\text{Civil Case } \frac{1}{1902}$$

Exhibit No. (1). Put in by Plaintiff.

27-1-02—Signature of Judge.

and

$$\text{Civil Case } \frac{1}{1902}$$

Exhibit No. A. Put in by Defendant.

27-1-02—Signature of Judge.

(*d.*) All exhibits should be placed at the end of the record and attached thereto in consecutive order.

(*e.*) Where the article produced is, for example, a knife or arrow-head in a criminal case, a similar procedure as to marking should be observed, and a label bearing particulars as above should be attached to the object itself or to the receptacle containing it by a tape or string sealed with the Court seal in such a way that it cannot be removed.

(*f.*) All exhibits in a case should be preserved with the utmost care by the Court in such a manner that they cannot be tampered with, and should not be returned to the owners until the period for appeal has expired, when they may be returned on a receipt being given.

(*g.*) Such exhibits as books of accounts may be returned to the producers after the particular entry exhibited has been marked and a copy thereof certified by the Court has been placed on the file.

Parties and witnesses to be fully described.

22. The names of parties and witnesses in all judicial proceedings must be recorded in full with such further particulars by way of description as may be requisite to ensure identification.

The name of the Father, village, tribe, and caste or religion should be entered with any further particulars that will help to identify the party

concerned, *e.g.*, his occupation, employer, chief or headman, and, in the case of Railway employees the number of his division and gang, and the Engineer under whom he works.

Actions by or against Government.

23. All Civil cases by or against the Government must be instituted by or against the Secretary of State for Foreign Affairs.*

In Criminal Cases the proceedings should be intituled "The Crown *versus* X.Y.Z." (the accused).

In all prosecutions and actions by the Government, the name of the person at whose instance proceedings are taken must appear on the file, *e.g.*, Inspector of Police Nairobi, Police Sergeant Ali b. Juma, the Chief of Customs, &c.

Attachments on wages.

24. Every attachment order upon wages must bear a memorandum to the following effect :—

"*Note.*—In accordance with the provisions of Section 266 of the "Civil Procedure Code, this order is to be disregarded if the debtor "is a labourer or domestic servant.

"If the debtor is a Public Officer or is a servant of a Railway "Co. or Local Authority it is to be disregarded—

"(*a*) If the wages of the debtor do not exceed Rs.20 a month.

"(*b*) If the wages exceed Rs.20 a month, and do not exceed "Rs.40 a month, it only affects the wages to the extent of Rs.20 a "month.

"(*c*) If the wages exceed Rs.40 a month the order applies to "one-half of the wages only.

"In returning the copy of this order, please endorse particulars "of the debtor's circumstances and pay."

Particulars on writs of summons.

25. The ground of every action must appear upon the face of the writ of summons as for instance that the claim is for "Rs.50 money lent on a waraka, dated the 1st of March, 1902," or, "for goods sold and delivered between the 10th of August, 1900, and the 7th of September, 1901," or "being the price of a cow sold to the Plaintiff," or "for damages for an assault" with particulars as to dates.

26. Every judgment must contain the reasons on which the decision of the Judge is based. It is insufficient in contested cases to write "guilty," or "Judgment for the Plaintiff." A failure to write a proper judgment may occasion a retrial or the quashing of a conviction.

27. Endorsements on the outside of the covering sheets supplied for Civil and Criminal files form no part of the record, and should only be

* Note.—This will now be Secretary of State for the Colonies.

filled up for convenience of reference. The charge and judgment must be set out in full in the proper place in the proceedings.

28. Officers should bear in mind that when acting in a judicial capacity they must decide the case before them in accordance with their own opinion. They are encouraged to consult with and take the advice of their superior officers, and the Judges and the Registrar of the High Court will always be glad to give them such assistance in the discharge of their judicial duties as may be possible, but every officer must give his opinion in accordance with the law as he understands it, even though he may know that his opinion does not accord with the views of his superior officer. No Officer may direct a subordinate as to the decision that is to be given in a judicial matter.

29. For the information of the Administrator-General, the tribe and religion of any deceased native leaving property should be carefully noted.

By order of the Judges of the High Court.

R. W. HAMILTON,
for Registrar.

MOMBASA, *April 30th*, 1904.

CIRCULAR NOTICE.

TO SUPERINTENDENTS OF JAILS AND OTHERS HAVING THE CUSTODY OF CONVICTED PRISONERS.

1. Should any convict being in prison wish to appeal, he must be informed that he may within seven days after the receipt of his petition of appeal by the Appellate Court, instruct a pleader to appear on his behalf, and that, if no appearance is entered on his behalf within that period, his appeal may be summarily dismissed.

2. A certificate should be endorsed on every petition of appeal by the officer forwarding it that the convict has been so informed.

R. B. P. CATOR,
R. W. HAMILTON.
Judges of the High Court.

MOMBASA, *August 25th*, 1904.

HIGH COURT OFFICE RULES.

German Subjects.

All summonses and notices issuing from the Courts at Mombasa, if addressed to, or to be served on any person known to be a German subject, should be sent in the first instance with a covering letter to the German Vice-Consul requesting his assistance.

Should it be necessary to execute a warrant in the house or on the premises of a German subject, the consent of the occupier or assistance of the German Vice-Consul must be first obtained.

R. W. Hamilton,
Principal Judge,
High Court, East Africa Protectorate.

Mombasa,
April 24th, 1905.

HIGH COURT OFFICE RULES.

June, 1905.

Payments out of Court.

(1.) All applications for payment of money out of Court must be supported by affidavit, and notice should be given to all parties interested except as provided in Rule (2.)

(2.) Applications may be made *ex parte* and without affidavit, when :—

(*a.*) The application is made with the consent of all parties concerned—in which case the consent must be in writing and attached to the application.

(*b.*) The application is made for the payment out of money, which a party charged with the payment thereof has, in the absence of any specific direction by the Court as to the manner of payment, elected to pay into Court under Section 257 of the code.

(*c.*) The application is made for the payment out of money which has been recovered by instalments under an order of the Court.

(*d.*) The application is made by a decree holder for the payment out of money realised under execution proceedings, there being no specific direction of the Court as to payment.

(3.) Court fees levied on all proceedings with reference to paying money into or out of Court are to be reckoned as costs in the cause unless specially ordered to the contrary.

(4.) All applications for payment out of money will be dealt with by the Registrar unless opposed, in which case they will be referred by him to the Judge in Chambers.

The fee for an application supported by an affidavit shall be Rs.5—for an application without affidavit, Rs.3—to include Registrar's order for payment out.

Where Judge's order is necessary it will be charged Rs.2.*

CIRCULAR TO MAGISTRATES.

No. 1 of 1905.

The attention of Magistrates is called to the fact that more discretion should be used in awarding the punishment of flogging.

In certain cases, for brutal crimes, or serious and repeated offences and in out-stations among turbulent tribes, it is no doubt, when applied within bounds, a useful and salutary form of punishment. Youthful offenders also often may properly be birched rather than imprisoned.

The monthly returns, however, show that offenders are not infrequently flogged for comparatively trivial offences which could be suitably punished by fine or imprisonment.

Magistrates are therefore requested when awarding sentence, to consider in each case with reference both to the offence committed and the position in life of the offender, whether it is one which requires the punishment of flogging.

R. W. Hamilton,
Principal Judge, High Court.

High Court for East Africa, Mombasa,
September 25th, 1905.

CIRCULAR TO MAGISTRATES.

No. 1 of 1906.

The attention of all magistrates is drawn to the great importance of making up the records of their cases carefully. When cases come for confirmation or on appeal before the High Court the following omissions are the most commonly noticeable.

1. Witnesses are insufficiently described.

2. No charge has been framed in warrant cases, or it has been framed after the accused has made his defence.

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* Note.—*Cf.* Table of Court Fees, Articles 7, 8, p. 130.

3. Pages are unnumbered, or the charge is on a separate unnumbered sheet.

4. Dates are wanting to show the commencement and subsequent adjournment of proceedings, and also of the final judgment or order of the Court.

5. There is often nothing to show how the proceedings were initiated, whether on the complaint of a private party or on action taken by the police.

6. The presence of the accused in Court is not noted, nor is it shown that he had the opportunity of cross-examining the witnesses for the prosecution, or that he has been asked if he has any witnesses to call in his defence.

7. The signature of the Magistrate does not show the capacity in which he is acting, *e.g.*, an Assistant Collector has no jurisdiction to try a native case in a special district unless he is in charge of a station, and a Collector or Assistant Collector in like manner only has powers of a 3rd Class Magistrate over Europeans if in charge of a Station.

It is essential that all these points should be recorded, in order that the High Court, which has to rely on the records only, may be enabled properly to understand the proceedings that have taken place before the Magistrate.

R. W. HAMILTON,
Principal Judge.

MOMBASA,
February 14th, 1906.

CIRCULAR TO MAGISTRATES.

No. 2 of 1906.

With reference to the power of imposing a sentence of whipping not exceeding twenty-five lashes conferred on Special Courts by the East Africa Native Courts Amendment Ordinance, 1905 (Official Gazette of 15th December, 1905).

H.M. Secretary of State for the Colonies desires that in practice the maximum number of strokes awarded should not exceed twenty-four.

R. W. HAMILTON,
Principal Judge.

HIGH COURT.
Dated, *March 20th*, 1906.

HIGH COURT OFFICE RULES.

Payment of Court Fees by Pleaders.

Owing to inconveniences that have arisen under the existing system by which Pleaders are given credit for Court Fees during the pendency of a case it has been decided to introduce the following rules for the future.

(1.) The initial summons fee must in all cases be paid in advance as hitherto.

(2.) All other costs of Court incurred in the course of a case must be paid as they are incurred. Should immediate payment however be impossible or inconvenient, the Pleader who has incurred the costs can obtain a memorandum of the same before the closing of the Court for the day, and will be permitted to pay them before Court hours on the next Court day following that on which they were incurred.

(3.) All charges entered in the memorandum must be paid as above, but in the event of objection being taken to any charge the objector may file a written protest at the time of payment containing his reasons for objecting. Such protest will be dealt with by the High Court. If the High Court decides in favour of the objector, the Judge may order any overpayment together with the fee for filing the protest to be returned to him.

(4.) It must be understood that credit where given is given to the Pleader personally, and will in no case be extended beyond the commencement of Court hours on the next Court day following that on which the costs were incurred.

By Order,

H. O. Dolbey,

Registrar, High Court.

High Court, Mombasa,

May 16th, 1906.

CIRCULAR TO MAGISTRATES.

NATIVE COURTS AMENDMENT ORDINANCE No. 31 OF 1902.

No. 3 OF 1906.

All cases under the above Ordinance in which an accused person is convicted of more than one offence should, if the aggregate sentence awarded exceeds six months, 24 lashes or Rs. 500 fine, be sent for confirmation.

By Order of the Judges of the High Court.

H. O. DOLBEY,
Registrar.

HIGH COURT, MOMBASA,
May 12th, 1906.

PROVISIONAL SCALE FOR PAYMENT OF WITNESSES, JURORS AND ASSESSORS.

Under Section 544, Criminal Procedure Code.

GENERAL.

Government servants are entitled to travelling expenses only.

Reasonable travelling expenses are allowed in all cases, having regard to the position in life of the person summoned.

The maximum sum is not necessarily to be given in all cases, but discretion must be exercised.

Exceptional cases are to be dealt with according to their merits apart from the following scale :

Europeans—

1. Professional men, that is duly qualified men actively pursuing their professions, such as lawyers, doctors, etc., a sum not exceeding Rs.15 per diem.

2. Shopkeepers and persons of similar position—sum not exceeding Rs.5 per diem.

3. Artisans—sum not exceeding Rs.2 per diem.

4. Other Europeans not included in foregoing classes—sum not exceeding Rs.10 per diem.

Asiatics—

5. Professional men (as in No. 1).

6. Shopkeepers and persons of similar position—sum not exceeding Re.3 per diem.

7. Artisans—sum not exceeding Re.1 per diem.

8. Labourers—sum not exceeding [illegible] per diem.

Natives—

9. Professional men (as in No. 1).

10. Arabs and Swahilis of the better class, Tribal chiefs, Wazee, &c.—sum not exceeding Re.3 per diem.

11. Porters, Cultivators and others—according to the prevailing wages in their respective districts.

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